Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

TERRANCE E. JACKSON,

Petitioner,

v.

JAMES A. GAMMON, ET AL.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court and the Eight Circuit Court of Appeals erred in requiring Petitioner Jackson to obtain a certificate of appealability when his case was filed before enactment of the AEDPA and further whether the lower courts erred in improperly limiting his certificate of appealability. The issue presented is identical to that presented in *Slack v. McDaniel*, 120 S. Ct. 390 (1990) (certiorari granted).

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions 2

Statement of the Case 5

I. Procedural History 5

II. Factual History 8

Reasons for Granting the Writ 12

I. The District Court and the Eighth Circuit Court of Appeals Erred in Requiring Petitioner Jackson to Obtain a Certificate of Appealability When His Case Was Filed Before Enactment of the AEDPA and Further Erred in Improperly Limiting His Certificate of Appealability 12

Conclusion 21

Appendix

Order affirming District Court's Judgment (10/28/99) . . . 1A

Order granting in part and denying in part Request for Certificate of Appealability (12/30/98) 13A

Amended Order (7/8/98) 17A

Order denying Motion to Reconsider (12/1/97) 19A

Judgment in a Civil Case denying Motion for an Evidentiary Hearing and denying Petition for Relief under 28 U.S.C. 2254 (10/23/96) 22A

Order denying Motion for an Evidentiary Hearing and denying Petition for Relief under 28 U.S.C. 2254 (10/23/96) 23A

Order denying Petition for Rehearing (1/6/00) 31A

Issuance of Mandate 32A

Application for Certificate of Appealability 34A

TABLE OF AUTHORITIES

Cases: Page(2)

Arredondo v. United States,
120 F.3d 639 (6th Cir. 1997) 16

Barefoot v. Estelle,
463 U.S. 880 (1983) 13,14,18,19,20

Berrios v. United States,
126 F.3d 430 (2d Cir. 1997) 16

Chambers v. Bowersox,
197 F.3d 308 (8th Cir. 1999) 12

Crowell v. Walsh,
151 F.3d 1050 (D.C. Cir. 1998) 16

Gerlaugh v. Stewart,
129 F.3d 1027 (9th Cir. 1997) 16

Green v. Johnson,
116 F.3d 1115 (5th Cir. 1997) 16

Hardwick v. Singletary,
122 F.3d 935 (11th Cir. 1997),
as amended, 126 F.3d 1312 (11th Cir. 1997) ... 16

Jackson v. Gammon,
195 F.3d 349 (8th Cir. 1999) 1

Johns v. Bowersox,
1997 U.S. App. LEXIS 32939
(8th Cir. November 19, 1997) 15

Koo v. McBride,
124 F.3d 869 16

Landgraf v. USI Film Products,
511 U.S. 244 (1994)... 17

Lindh v. Murphy,
521 U.S. 320 (1997) 13,14,15,16,17
18,20

Loehrer v. McDonnell Douglas Corp.,
98 F.3d 1056 (8th Cir. 1996) 14

Martin v. Bissonette,
118 F.3d 871 (1st Cir. 1997) 16

Ramsey v. Bowersox,
149 F.3d 749 (8th Cir. 1998) 15

Reddick v. Haws,
120 F.3d 714 (7th Cir. 1997) 16

Slack v. McDaniel,
120 S. Ct. 390 (1990) 1,12,20

Sweet v. Delo,
125 F.3d 1144 (8th Cir. 1997) 15

Tiedeman v. Benson,
122 F.3d 518 (8th Cir. 1997) 8,12,13,14,15
17,18,19

United States v. Carter,
117 F.3d 262 (5th Cir. 1997) 16

United States v. Kunzman,
125 F.3d 1363 (10th Cir. 1997) 13,16

United States v. Skandier,
125 F.3d 178 (3d Cir. 1997) 13,15,16,17,18

Statues: **Page(s)**

28 U.S.C. § 1254 1

28 U.S.C. § 2253 12

28 U.S.C. § 2253(c) 19

28 U.S.C. § 2254 2,7

28 U.S.C. § 2264(b) 16

OPINIONS BELOW

The October 28, 1999, Panel Opinion of the United States Court of Appeals for the Eighth Circuit affirming the denial of federal habeas relief is reported at *Jackson v. Gammon*, 195 F.3d 349 (8th Cir. 1999), and is included in the appendix at 51A. The district court's order denying habeas relief is not reported, but is included in the appendix at 2A.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 28, 1999. The Petition for Rehearing by the Panel or Rehearing En Banc was denied on January 6, 2000. Under Supreme Court Rule 13.1, the Petition for Writ of Certiorari is timely filed within the 90-day period. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the Constitution of the United States is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

> witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the Constitution of the United States is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253 of Title 28 states as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice of judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant

has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On September 30, 1988, a felony indictment was filed in the Circuit Court of Jackson County, Missouri, charging Mr. Jackson with one count of murder in the second degree in violation of R.S. MO § 565.021.1, two counts of armed criminal action in violation of R.S. MO. § 571.015.1, and one count of assault in the first degree in violation of R.S. MO. § 558.011.1. Mr. Jackson was arraigned on October 13, 1988. Bond was set at $250,000. Mr. Jackson entered a plea of not guilty on October 13, 1988. On July 10, 1989, trial by jury commenced in the Circuit Court of Jackson County, Missouri. That trial resulted in a mistrial as to Defendants Terrance Jackson and Michael Hamilton. Co-defendant Leroy Hudson was convicted of second degree murder and Defendant Michael Sanders was found not guilty.

A new trial by jury of only Mr. Jackson commenced in the Circuit Court of Jackson County, Missouri, on August 28, 1989. Following the conclusion of the State's case, Mr. Jackson filed a Motion for Judgment of Acquittal, which was denied by the Court. Mr. Jackson orally renewed his Motion for Judgment of Acquittal at the close of all evidence, and the court denied the motion. After submission of instructions and closing arguments by the parties, the jury began deliberations, and on August 31, 1989, returned a verdict of guilty on all four counts, with a recommended sentence of life for each count. Petitioner timely filed a Motion for Judgment of Acquittal and New Trial. On November 8, 1989, the trial court, after denying Petitioner's Motion for Judgment of Acquittal and New Trial, sentenced Petitioner to a term of four life sentences to be served consecutively.

Following the verdict on November 9, 1989, Mr. Jackson filed a Notice of Appeal to the Missouri Court of Appeals, Western District. On May 31, 1990, with his appeal pending, Mr. Jackson filed a pro se motion to set aside the judgment and conviction pursuant to Mo. R. Crim. P. 29.15, raising issues of ineffective assistance of counsel, error in the admission of other crimes evidence, unreliable identification evidence, and error in admission of evidence not linked to him. The Court denied Petitioner's 29.15 motion on June 14, 1991, after it held an evidentiary hearing. Mr. Jackson then pursued his consolidated appeal, which included the appeal of his conviction and the appeal of the denial of his Rule 29.15 motion, in the Missouri Court of Appeals.

Petitioner's conviction was affirmed by the Missouri Court of Appeals, Western District, on June 30, 1992. In his appeal, Mr. Jackson raised several issues including the error of admitting evidence of other crimes, prosecutorial misconduct, and ineffective assistance of counsel.

Mr. Jackson then filed a motion for rehearing or in the alternative, transfer to the Missouri Supreme Court, which was overruled by the Missouri Court of Appeals, Western District, on September 1, 1992.

On July 20, 1995, Mr. Jackson filed his Motion to Recall the Mandate in the Missouri Court of Appeals, Western District. The motion raised claims of ineffective assistance of appellate counsel for failure to raise on appeal the issue of insufficiency of evidence, and for failure to raise on appeal the issue of unconstitutionally suggestive identification procedures. An amended motion raising the same issues was filed on July 28, 1995. The Court denied the Motion on August 29, 1995.

On January 30, 1996, Petitioner Jackson filed his Petition for Writ of Habeas Corpus and Incorporated Memorandum in Support of Petition pursuant to 28 U.S.C. § 2254. After the district court issued a show cause Order, Respondents timely filed their response. Petitioner then filed his Traverse on April 10, 1996.

On October 23, 1996, the district court entered its Judgment and Order denying Petitioner's claims for writ of habeas corpus. Petitioner timely filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e) on November 1, 1996, and supplemented that Motion on November 25 1996. The district court denied Petitioner's Motion on December 1, 1997. A copy of the court's order was never sent to the parties, however, because of a series of "clerical and filing errors." The district court issued an Amended Order on July 8, 1998, again denying Petitioner's Motion and setting the date of the Amended Order as the applicable filing date. Petitioner then timely filed a Notice of Appeal and an Application for a Certificate of Appealability. The district court issued an Order granting in part and denying in part Petitioner's request for a Certificate of Appealability. The district court granted the certificate as to only one issue — the claim of ineffective assistance of counsel regarding the failure to challenge the impermissibly suggestive eyewitness identification. Petitioner then filed an Application in the Eighth Circuit Court of Appeals for an expanded certificate of appealability encompassing all issues raised in the Petition for Writ of Habeas Corpus. The appeals court denied Petitioner's Jackson's request on March 9, 1999.

On October 28, 1999, the Eighth Circuit Court of Appeals affirmed the district court's denial of habeas relief. *See* App. 1A. The appeals court agreed with the district court's conclusion that trial and appellate counsel were not ineffective

for failing to challenge the eyewitness identification. The appeals court also rejected the argument that Petitioner should not have been required to obtain a certificate of appealability. The Eighth Circuit stated that it was bound by its prior decision in *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997), which applies the certificate of appealability requirement to all habeas cases, regardless of when they were filed. Mr. Jackson requested rehearing by the panel or rehearing en banc. The appeals court rejected his petition on January 6, 2000. His petition for writ of certiorari is timely filed in this Court on or before April 5, 2000.

II. FACTUAL HISTORY

On the evening of September 13, 1988, Eric Dunlap and Steve White were playing basketball in the park at 35th and Wabash in Kansas City, Missouri. After they played basketball for a short time, they walked to the corner of 35th and Wabash where they talked with Roger Murray. While talking with Murray and White, Dunlap noticed Arlvelt Bruster walking down the sidewalk. In addition, Dunlap saw several other people in the park that evening, including his cousins Louis "L.C." Dunlap and Robert Wright, one of the victims in this case. It was about 12:30 a.m.

As these men were talking, Dunlap noticed a blue van approaching on Wabash. Dunlap testified that the van was moving slowly down the street, and he noticed that the sliding door on the van was open. Dunlap testified that he looked into the van and saw people he knew. He stated that he knew Leroy Hudson and that Hudson was driving the van. He also testified that he knew Terrance Jackson, who he said was seated in the middle of the van. He further testified that he also recognized a big guy who he said looked like Michael Hamilton, who he said was seated on one side of Mr. Jackson. Dunlap testified

that there were other individuals who he did not recognize in the van.

Dunlap testified that, as he watched, the van continued toward the corner of 34th and Wabash. He testified that he saw shots coming from the van and that he believed that Mr. Jackson had something in his hand in the back of the van but he could not tell what it was. He could not state with any certainty that Mr. Jackson shot any gun from the van.

Dunlap testified that he ducked down and hid behind a car at the corner of 35th and Wabash during the shooting. He testified that as he began to stand up to see what was going on, he noticed a yellow Ford LTD driving behind the van. He testified that he recognized Fletcher Wiley, the driver of the car, but did not recognize the other two people in the car. Eric quickly ducked down again because there were gunshots coming from the yellow car. Dunlap testified that the shooting stopped and he heard someone say "Robert got shot." He testified that he then saw someone drive off with Robert.

After this incident, Dunlap went home to his grandmother's house and then proceeded to the hospital, Truman Medical Center. While at the hospital, Dunlap and Bruster discussed retaliation and decided that they would do whatever it took to get the men involved. From the hospital, Dunlap went with Arlvelt Bruster and Mike Powell to the police station.

Once at the police station, Dunlap and Bruster were shown a group of photographs. Dunlap initially picked out Mike Hamilton's photograph and then told the police detective that he could not make any other identification from the photographs. The detective then left Dunlap alone in the room with the photographs and told him to "keep looking at them."

While alone, Dunlap looked on the back of the photographs and saw the names of Leroy Hudson and Terrance Jackson on two of the photographs. When the detective returned, Dunlap picked out those photographs as showing the suspects in the shooting. The police detective then told Dunlap that the photographs were not of Leroy Hudson and Terrance Jackson, but were of other individuals. Dunlap indicated at trial that the photographs did not look like either of the two men. He later picked out the correct photographs of Jackson and Hudson.

Arlvelt Bruster also testified at the trial. He testified that he, too, had seen the blue van approaching on 35th Street. He testified that he saw Hudson, Hamilton, Jackson and Sanders in the van and that Hudson was driving. He also testified that the three men in the back, Hudson, Hamilton and Jackson, were holding something in their hands, but Bruster could not tell what it was. He testified that he saw "fire" coming from the van, and then he ran behind a building to hide. When the shooting stopped, Bruster emerged and saw a gold LTD following the van. He identified the car as that of Fletcher Wiley. He testified that Wiley and an Edward Buford were leaning out of the windows, shooting.

L.C. Dunlap testified at trial that he and Robert Wright were walking to Renauld Shelton's car when he heard the gunshots. He did not initially see where the shots were coming from. He and Wright "hit the ground" when they head the shots and when he looked up, he saw the light blue van driving away. He testified that he then saw gunfire coming from the location of three individuals seated in the back of the van. He testified that he did not see who was seated in the van. He also testified that he did not see if any second vehicle drove by.

Robert Wright died shortly after reaching the hospital. The doctor performing the autopsy testified that a single gun shot wound to the head and neck had caused his death.

Another individual, Carl Washington, was injured that evening. Mr. Washington was leaving the park when he was shot in his hip. He did not see who shot him nor did he see any cars in the area when he was shot. Mr. Washington was taken to St. Luke's Hospital where he stayed for about a week. Mr. Washington was not familiar with any of the individuals named above.

Mr. Jackson's grandmother, Ella B. Jackson, testified that Mr. Jackson had returned home on the night in question at approximately 12:40 a.m. She also testified that when she got up the next morning, her grandson was still lying on the couch where she had left him the night before.

The testimony of Steve Dwayne Lloyd from a prior hearing was read into the record. Lloyd testified that he was also at the park at the time of the shooting. He testified that Arlvelt Bruster was "a little" intoxicated that night.

The above evidence was submitted to the jury which convicted Terrance Jackson of murder in the second degree, assault in the first degree, and two counts of armed criminal action. He was sentenced to life on each count. These four life sentences were ordered to be served consecutively by the trial court.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN REQUIRING PETITIONER JACKSON TO OBTAIN A CERTIFICATE OF APPEALABILITY WHEN HIS CASE WAS FILED BEFORE ENACTMENT OF THE AEDPA AND FURTHER ERRED IN IMPROPERLY LIMITING HIS CERTIFICATE OF APPEALABILITY

The district court and the Eighth Circuit Court of Appeals erred in requiring Mr. Jackson to obtain a certificate of appealability under 28 U.S.C. § 2253, as his case was filed before enactment of the Anti-terrorism and Effective Death Penalty Act (AEDPA). The lower courts followed the Eighth Circuit's precedent in *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997), which held that all habeas petitioners must obtain a certificate of appealability specifying the issues to be appealed regardless of when their case was filed. The *Tiedeman* decision stands alone among the circuits. This Court recently granted certiorari in *Slack v. McDaniel*, 120 S. Ct. 390 (1999), to address this very issue — namely whether a certificate of appealability is required in cases that predate the AEDPA. *See also Chambers v. Bowersox*, 197 F.3d 308 (8th Cir. 1999) (granting stay of execution based on grant of certiorari in *Slack*). Based on *Slack* alone, this Court is required to grant certiorari in Mr. Jackson's case.

The district court and the appeals court further erred in limiting Mr. Jackson's certificate of appealability to the issue of trial and appellate counsels' ineffectiveness for failing to challenge the impermissibly suggestive eyewitness identification. The lower courts erred in refusing to expand the certificate of

appealability as requested by Mr. Jackson. The Eighth Circuit denied Mr. Jackson's request for an expanded certificate on March 9, 1999.

Petitioner asserts that the district court's order and the Eighth Circuit's opinion reflect an improper application of *Barefoot v. Estelle*, 463 U.S. 880 (1983), and also conflicts with this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997). Mr. Jackson's habeas petition was filed well before the recent amendments to the Antiterrorism and Effective Death Penalty Act (AEDPA), which imposed new requirements on the right to appeal. Under *Lindh*, the new amendments should not apply to Mr. Jackson. Moreover, all of his claims amply satisfy the *Barefoot* standard in that they involve a "substantial showing of the denial of a federal right. *Barefoot*, 463 U.S. at 893.

The district court's order and the Eighth Circuit's opinion reflect an application of the Eighth Circuit's decision in *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997), which held that all habeas litigants must now obtain a certificate of appealability (COA) before appealing, regardless of whether their case was filed before or after enactment of the AEDPA. *Tiedeman*'s holding squarely conflicts with this Court's decision in *Lindh*, and runs counter to the decisions of other circuits that have considered the applicability of the COA provisions to pre-AEDPA cases. In fact, the cases of other circuits have singled out *Tiedeman* as the lone appellate decision requiring the issuance of a certificate of appealability in cases predating the AEDPA. *See, e.g.*, *United States v. Kunzman*, 125 F.3d 1363, 1364-65 n.2 (10th Cir. 1997) (explicitly rejecting *Tiedeman* and joining majority of circuits in holding that petitioners whose cases predate the AEDPA do not need COAs); *United States v. Skandier*, 125 F.3d 178, 182 (3d Cir. 1997) (stating that *Tiedeman* runs counter to the reasoning of *Lindh*).

Petitioner Jackson asserts that *Tiedeman* is wrongly decided and should be rejected by this Court. Petitioner further asserts that the district court and the appeals court incorrectly applied *Tiedeman* when they restricted his certificate of appealability to certain issues when all of his issues satisfied the applicable standard as stated in *Barefoot*.

The questions presented concerning the construction of the AEDPA and the proper application of *Tiedeman* are all questions of law and, as such, must be reviewed by this Court *de novo*. *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996).

In *Lindh*, this Court addressed whether a provision in chapter 153 of the AEDPA (of which section 2253 is a part) applied to cases that predated passage of the Act. Specifically at issue in *Lindh* was section 2254(d), which governs standards affecting entitlement to relief in habeas cases originating in the state courts. The Court examined the language of the AEDPA and the legislative history and concluded that the new amendments were not to be retroactively applied. The Court stated:

> The statute reveals Congress's intent to apply the amendments to chapter 153 [the general habeas provisions] only to such cases as were filed after the statute's enactment except where chapter 154 [the special death penalty provisions] otherwise makes select provisions of chapter 153 applicable to pending cases).

Lindh, 521 U.S. 320, 117 S. Ct. 2059, 2063 (emphasis added). The provisions governing certificates of appealability, codified at section 2253(c), are not among "those select provisions of chapter 153" that were expressly made applicable to pending

capital cases. Thus, under *Lindh*, the amended section 2253 should not apply in the present case, which was filed well before enactment of the AEDPA.

Although several circuits held in the wake of *Lindh* that the certificate of appealability provisions cannot be applied to cases that were filed before the AEDPA's enactment, the Eighth Circuit reached the opposite conclusion in *Tiedeman*. *See Skandier*, 125 F.3d at 181 (citing numerous decisions rejecting retroactivity of 2253(c) and citing *Tiedeman* as lone example of opposing viewpoint). In *Tiedeman*, the Eighth Circuit held that the AEDPA provisions pertaining to appeals were "procedural only." Because these provisions supposedly effected no change in the substantive standards governing certificates of appealability, they could properly be applied in all cases, regardless of whether they were filed before or after the enactment of the AEDPA. *Tiedeman*, 122 F.3d at 521.

Although *Tiedeman* is at odds with numerous decisions of other circuit courts, it has been followed in the subsequent decisions of the Eighth Circuit. *See Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Sweet v. Delo*, 125 F.3d 1144, 1148 n.5 (8th Cir. 1997); *see also Johns v. Bowersox*, 1997 U.S. App. LEXIS 32939 (8th Cir. November 19, 1997) (unpublished decision stating that *Tiedeman* is controlling precedent unless and until it is overruled by a decision of the court en banc or by the Supreme Court).

Tiedeman is completely contrary to and in conflict with *Lindh*. The mandate of *Lindh* is clear: the general habeas provisions of chapter 153 are not to be applied to cases filed before enactment of the AEDPA except where the Act specifically provides for retroactive application. Each of the circuits that has addressed the issue has determined that *Lindh*

bars retroactive application of the chapter 153 provisions.[1] *Lindh* is based on a careful analysis of the language and structure of the AEDPA and the legislative history. *See Skandier*, 125 F.3d at 180-82. In *Lindh*, this Court focused particularly on two provisions that specifically address retroactive application. Section 107(c) of the AEDPA expressly provides that the new chapter 154 (which provides new rules in capital cases) "shall apply to cases pending on or after the date of enactment of this Act." There is no similar language with respect to chapter 153, which contains the provisions pertaining to certificates of appealability. The *Lindh* Court stated: "We hold that the negative implication of § 107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." 117 S. Ct. at 2068. The *Lindh* Court also relied on another provision, codified at 28 U.S.C. § 2264(b) and originally contained in chapter 154, which provides for application of sections 2254(d) and (e) to pending capital cases. There would have been no need to provide for retroactive application of these particular provisions if Congress had intended for all of chapter 153 to apply to cases filed before enactment of the Act.

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1 First: *Martin v. Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997); Second: *Berrios v. United States*, 126 F.3d 430, 431 n.2 (2d Cir. 1997); Third: *United States v. Skandier*, 125 F.3d 178, 180-81 (3d Cir. 1997); Fifth: *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997); *United States v. Carter*, 117 F.3d 262, 264 n.1 (5th Cir. 1997); Sixth: *Arredondo v. United States*, 120 F.3d 639, 640 (6th Cir. 1997); Seventh: *Koo v. McBride*, 124 F.3d 869, 872 and n.3 (7th Cir. 1997); *see also Reddick v. Haws*, 120 F.3d 714, 715 n.1 (7th Cir. 1997); Ninth: *Gerlaugh v. Stewart*, 129 F.3d 1027, 1031 n.2 (9th Cir. 1997); Tenth: *United States v. Kunzman*, 125 F.3d 1363, 1364-65 n.2 (10th Cir. 1997); Eleventh: *Hardwick v. Singletary*, 122 F.3d 935, 936 (11th Cir. 1997), *as amended*, 126 F.3d 1312 (11th Cir. 1997); D.C.: *Crowell v. Walsh*, 151 F.3d 1050, 1051-52 (D.C. Cir. 1998).

In *Skandier*, the Third Circuit explicitly criticized the reasoning of *Tiedeman*, asserting that the Eighth Circuit missed the "essential message" of *Lindh*:

> The Eighth Circuit's analysis turns on the penultimate sentence of *Lindh*: "the new provisions of chapter 153 *generally* apply only to cases filed after the Act became effective." . . .From this use of "generally" the *Tiedeman* court determines that the Supreme Court meant to say that not all provisions of chapter 153 apply only prospectively, and, we infer, that typical rules of statutory construction (e.g., distinguishing between substantive and procedural amendments) should apply to reach the conclusion that § 2253(c) should have retroactive application. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994). . .(setting forth default rules of construction with regard to retroactive application).
>
> We disagree. The essential message of *Lindh*, we believe, is that we need not resort to a *Landgraf* analysis with its default rules of retroactive/ prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended.

Skandier, 125 F.3d at 182 (emphasis in original). The Third Circuit then observed that the *Tiedeman* Court's reading of the "generally apply" language of *Lindh* has undermined this Court's analysis of sections 107(c) and 2264(b). *Skandier* concluded: "[S]ince § 2253(c) is part of chapter 153, we hold that that

section should not apply to a [habeas corpus case] that was filed before [the] AEDPA's effective date." *Id.*

The analysis of *Skandier* is correct: *Lindh* prohibits application of the appealability provisions of section 2253(c) to cases pending before enactment of the AEDPA. Therefore, a habeas petitioner seeking to appeal in such a case need not obtain a certificate of appealability, but must obtain only a certificate of probable cause. A certificate of probable cause is governed by the *Barefoot* standard ("substantial showing of the denial of a federal right"), and, if granted, serves to place the *entire* case, rather than just selected issues, before the court of appeals.

Petitioner Jackson therefore asserts that the lower courts erred in limiting his certificate of appealability to the specified issue. Under pre-AEDPA law, once a certificate of probable cause is issued, petitioner and his counsel are permitted to exercise independent professional judgment in deciding which claims to advance on appeal. Under *Barefoot v. Estelle*, 463 U.S. 880 (1983), a petitioner is entitled to appeal his entire case to the appellate court raising those issues he and his counsel deem appropriate. Interestingly, at least a portion of *Tiedeman* would suggest this result. *Tiedeman*'s holding is premised on the Eight Circuit's apparent conclusion that the AEDPA effected no substantive change in the standards by which certificates of appealability are governed. If there has been no substantive change in the law, then the *Barefoot* approach still prevails, and Mr. Jackson is entitled to bring his *entire* case before the Eighth Circuit.

Unfortunately, however, *Tiedeman* is internally inconsistent. After observing that the AEDPA effects "no substantive change" in the appealability standards, it then stated that the district court must individually examine each issue and

specify those which satisfy the appealability standard. This represents a significant departure from the pre-AEDPA practice, in which the entire case could be appealed with no preselection or rejection of particular issues. Thus, the AEDPA, as construed by *Tiedeman*, does in fact effect a "substantive change" to the law governing certificates of appealability. As such, it cannot be retroactively applied to cases pending before enactment of the AEDPA.

Aside from the issue of whether *Tiedeman* is wrongly decided, Petitioner Jackson asserts that all of his claims satisfy the appealability standards of both the AEDPA and *Barefoot*. Each of the rejected issues individually and collectively constitute a "substantial showing of the denial of a constitutional right."[2] 28 U.S.C. § 2253(c). The new statutory standard is nearly identical in its wording to the *Barefoot* standard (which uses the word "federal" instead of "constitutional"). A review of *Barefoot* reveals that its standard

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2 For example, Mr. Jackson has raised claims concerning ineffectiveness of counsel for failure to object to evidence of admission of other crimes evidence and for failure to object to improper and inflammatory closing argument by the prosecutor. Mr. Jackson has also argued that the improperly admitted evidence and the prosecutor's argument constituted plain error, violating his constitutional rights to due process and a fair trial. He also argued in the district court that appellate counsel was ineffective for failing to argue that the evidence was insufficient as a matter of law to convict Mr. Jackson. Under the Barefoot standard, Mr. Jackson should have been entitled to raise all of these claims. He also should have been permitted to brief on appeal the issue of whether the district court erred in denying him an evidentiary hearing. See discussion, supra. All of these claims have substantial merit, and any of them individually could justify the grant of a new trial. The question presently before this Court is narrower, however. *Tiedeman* was wrongfully decided, and Mr. Jackson should be entitled, with his counsel, to determine which claims he raises on appeal. The certificate of appealability requirement of section 2253 cannot be retroactively applied to cases that predate the AEDPA.

is not particularly demanding. *Barefoot* requires only that the petitioner "demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different] manner; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot*, 463 U.S. at 893 n.4. Petitioner has more than satisfied this standard, and he should be permitted to proceed with all of his issues.

In support of his argument, Petitioner refers this Court to the arguments stated in his Application for Certificate of Appealability filed in the Eighth Circuit. *See* App. 34A.

This Court should grant certiorari for the same reasons it granted review in *Slack*. Under *Lindh*, no certificate of appealability is required, and Mr. Jackson is entitled to bring *all* of his claims before the Eighth Circuit.

CONCLUSION

Mr. Jackson respectfully requests that this Court grant his Petition for Writ of Certiorari. This is required based on the Court's grant of the similar petition in *Slack*. He further requests that this Court reverse the decision of the Eighth Circuit and remand with directions to permit him to appeal his entire case to the Eighth Circuit Court of Appeals.

Respectfully submitted,

JAMES R. WYRSCH
(Counsel of Record)
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1330

Terrance E. Jackson,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	Appeal from the United States
James A. Gammon,	*	District Court for the
Superintendent,	*	Western District of Missouri
Moberly Correctional Center,	*	
Jeremiah Nixon,	*	
Attorney General,	*	
State of Missouri,	*	
	*	
Appellees.	*	

Submitted: September 14, 1999

Filed: October 28, 1999

Before McMILLIAN, FAGG and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

Terrence Jackson (petitioner) appeals from a final order entered in the United States District Court[1] for the Western District of Missouri denying his petition for a writ or habeas corpus pursuant to 28 U.S.C. § 2254. Jackson v. Gammon, No. 96-126-CV-W-1 (W.D. Mo. Oct. 23, 1996 (order) (hereinafter "slip op."). For reversal, petitioner argues that the district court erred in denying relief on his claims of ineffective assistance of trial and appellate counsel in light of their failure to challenge the admissibility of certain eyewitness identification testimony. Petitioner additionally argues that, because he filed his § 2254 petition prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), he should not be limited to appealing only those claims for which a certificate of appealability was granted. For the reasons stated below, we affirm the order of the district court.

Jurisdiction

Jurisdiction was proper in the district court based upon 28 U.S.C. § § 1331, 2254. Jurisdiction is proper in this court based upon 28 U.S.C. § § 1291, 2253(a). The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

Background

On September 13, 1988, at approximately 1:00 a.m., a drive-by shooting occurred at a park at 35th and Wabash, Kansas City, Missouri. As a result of the shooting, one individual died and another was severely injured. Based upon

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[1]The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

that incident, petitioner was tried before a jury in Missouri state court.

Witnesses for the state testified at petitioner's trial that, on the night in question, they saw a blue van drive slowly past the park while several individuals fired shots through the van's open side door. Eric Dunlap identified petitioner in court and testified that he saw petitioner sitting in the back of the van (around the middle of the van), apparently holding something in his hands, while the shots were fired. See Trial Transcript, Vol. II, at 216-18. Dunlap testified that he had known petitioner for approximately three years prior to the shooting. See id, at 202-03. Dunlap also testified that, after the shooting occurred, he went to the hospital and then, from there, went to the police station to give a statement about the shooting. See id. at 222-23. Regarding the events at the police station, Dunlap testified at trial to the following sequence of events. See id. at 224-26.

At the police station, an officer showed Dunlap an array of photographs and asked him to identify the individuals he had seen in the blue van. Dunlap selected one photograph, identifying the individual as Michael Hamilton and stating that Hamilton had been in the van during the shooting. Dunlap indicated that he could not make any other identifications from the photographs. The officer then left the room, telling Dunlap to keep looking at the pictures. While the officer was out of the room, Dunlap looked at the backs of the photographs and saw the names "Terrance Jackson" and "Leroy Hudson" written on two separate photographs. After the officer returned, Dunlap picked out those two photographs, stating that he picked them out because of the names on the backs, even though -- as he testified at trial -- the picture marked "Leroy Hudson" did not look like Leroy Hudson and the picture marked "Terrance Jackson" looked like petitioner "just a little bit." Id. at 226. After being informed that the pictures were not photographs of Terrance Jackson and Leroy Hudson, Dunlap was shown a

different photographic array and, this time, selected actual photographs of petitioner and Hudson.

Petitioner's trial counsel did not object to the admission of Dunlap's in-court identification of petitioner or to his testimony about the photographic identification procedures used at the police station. Another witness for the state, Arlvelt Bruster, also identified petitioner, among others, as having been in the back of the blue van at the time of the shooting. Bruster testified that petitioner was sitting in the middle part of the van and appeared to be holding something in his hands while the shots were being fired. See id. at 352-56. After the shooting, Bruster went to the hospital and, from there, went to the police station where he was shown a photographic array. Bruster identified petitioner's photograph as depicting one of the individuals whom he had seen in the blue van at the time of the shooting. See id. 356-60. Bruster testified that he had known petitioner approximately three years prior to the shooting. See id. 359.

Petitioner was found guilty on one count of second degree murder, two counts of armed criminal action, and one count of first degree assault. Petitioner was sentenced in Missouri state court to four consecutive life sentences. Petitioner appealed his conviction. Petitioner did not raise, in the direct criminal appeal, a claim of plain error based upon the admission of Dunlap's in-court identification or testimony concerning Dunlap's pretrial photographic identification of petitioner at the police station.

Petitioner also separately filed a motion for post-conviction relief in Missouri state court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's counsel in the Rule 29.15 proceeding argued, among other things, that Dunlap's photographic identification of petitioner was unreliable and that trial counsel had been ineffective in failing to file a pretrial motion to suppress evidence related to that identification or to object during trial to the admission of such evidence,

particularly where petitioner's theory of defense was based upon alibi and unreliable identification. See Appellant's Appendix, Vol. I, at 94-95 (transcript of hearing on Rule 29.15 motion). The state court denied petitioner's motion for post-conviction relief on the ground that prejudice had not been demonstrated. See id. at 44-45 (unpublished state court order denying post-conviction relief). Petitioner appealed the denial of his motion for post-conviction relief.

The state court of appeals consolidated petitioner's two appeals - the direct appeal from his conviction and his appeal from the denial of post-conviction relief. Both state court judgments were summarily affirmed. See State v. Jackson, 834 S.W.2d 802 (Mo. Ct. App. 1992).

Petitioner, represented by his present counsel, filed a petition for writ of habeas corpus in federal district court on January 30, 1996.[2] Petitioner asserted, among other things, that he was denied due process and received ineffective assistance of counsel because of his appellate counsel's failure to challenge the admission of Dunlap's eyewitness identification testimony, which had been obtained through unconstitutionally suggestive means.[3] The district court construed these assertions as

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[2] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became effective on April 24, 1996.

[3] The petition stated this claim for relief as follows:

> Petitioner Was Denied Due Process and the Effective Assistance of Counsel When Appellate Counsel Failed to Challenge the Admission of Eyewitness Identification Testimony That Was Obtained Through Unconstitutionally Suggestive Means; The Admission of the Testimony Should Have Been Challenged on the Basis of Plain Error and Through a Claim of Ineffective Assistance of Counsel.

Appellant's Appendix, Vol. II, at 233-34 (Petition for Writ of Habeas Corpus

"claiming] that the state court allowed, and Petitioner's trial and appellate counsel should have objected to, the admission of improper eyewitness identification testimony." Slip op. at 6. In addressing these grounds for relief, the district court stated: "[f]or the sake of judicial economy, the Court proceeds to the merits without regard to the procedural posture." Id. at 7.[4] The district court considered whether the photographic identification procedures used at the police station were so suggestive as to render the subsequent admission of Dunlap's identification testimony at trial a violation of petitioner's right to due process under the standard set forth in Trevino v. Dahm, 2 F.3d 829, 833 (8th Cir. 1993). See slip op. at 6.

The district court opened that the question of whether the photographic identification procedures actually prejudiced petitioner "could go either way." Id. at 7. However, based upon the totality of the circumstances - including Dunlap's familiarity

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at 28-29 (filed Jan. 30, 1996)). In responding to an order of the district court to show cause why the petition should not be granted, respondents interpreted the above-quoted claim as setting forth the following two separate grounds for relief:

> 6. Ineffective Assistance of Direct Appeal Counsel: Direct appeal counsel failed to allege that it was plain error to admit the eyewitness identification testimony by Mr. Dunlap.
>
> 7. Ineffective Assistance of Counsel on Appeal of the Denial of the post-Conviction Motion: Post-conviction appellate counsel failed to allege trial counsel was ineffective for not moving to suppress the eyewitness identification.

Id. at 245 (Response to Order to Show Cause at 3).

[4]We, too, dispose of the present case on the merits of petitioner's constitutional claims without regard to any procedural default issues that could have been raised by the state.

with petitioner prior to the shooting, the fact that the van was moving slowly with the side door open, and Dunlap's "high degree of attention during the crime" - the district court concluded that Dunlap's in-court identification was reliable despite any suggestive or inappropriate pretrial identification procedures used at the police station. Id. at 7-8.

The district court denied relief under 28 U.S.C. § 2254 on "all grounds presented," id. at 10, and entered judgment for respondents on October 23, 1996. Petitioner filed a timely notice of appeal from the judgment.[5]

Petitioner thereafter filed an application for a certificate of appealability in the district court. The district court granted the application "on the issue of whether [petitioner's] appellate counsel was ineffective in failing to object to the admission of the eyewitness identification testimony at trial," and denied it "as to all other issues." Jackson v. Gammon, No. 96-0126-CV-W-1 (W.D. Mo. Dec. 30, 1998) (order granting in part and denying in part application for certificate of appealability). Petitioner then filed a notice of appeal from the partial denial of the application for a certificate of appealability and also applied for a broader certficiate of appealability from this court. This court entered an order stating "[the appeal will proceed on the issues on which the District Court granted the certificate." Id. No. 99-1330 (8th Cir. Mar. 9, 1999)(order issued by the Clerk for the Eighth Circuit at the direction of the Court).

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[5] By motion and amended motion filed on November 1, 1996, and November 25, 1996, respectively, petitioner moved pursuant to Fed. R. Civ. P 59(e) to alter or amend the judgment denying the petitioner for a writ of habeas corpus. The Rule 59(e) motion was denied by an order of the district court dated December 1, 1997. However, the district court inadvertently failed to notify some or all of the parties of its order denying petitioner's Rule 59(e) motion. Upon realizing the oversight several months later, the district court amended the order of December 1, 1997, to elect a date of July 8, 1998. See Jackson v. Gammon, No. 96-0126-CV-W-1 (W.D. Mo. July 8, 1998) (amended order). Petitioner's notice of appeal was filed on July 14, 19988.

Discussion

Certificate of appealability requirement

As a preliminary matter, we address petitioner's argument that he should be permitted to raise on appeal claims for which no certificate of appealability was granted. He argues that he should not be bound by the certificate of appealability requirement in 28 U.S.C. § 253(c) because he filed his § 2254 petitioner in the district court "well before the recent amendments tot he Antiterrorism and Effective Death Penalty Act (AEDPA), which imposed new requirements on the right to appeal." Brief for Appellant at 18. He acknowledges that, under Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997), the law in this circuit is that a certificate of appealability is now required for all § 2254 appeals to proceed, regardless of when the petition was originally filed. He contends, however, that Tiedeman was wrongly decided under Lindh v. Murphy, 521 U.S. 320 (1997), and should be overruled by this court en banc. He maintains that every other circuit that has addressed this AEDPA retroactivity issue has decided it contrary to the holding in Tiedeman. See Brief for Appellant at 21 & n.4(citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). In fact, he points out, one circuit has specifically criticized the Eighth Circuit rationale in Tiedeman as fundamentally flawed. Id. at 19-24(citing United States v. Skandier, 125 F.3d 178, 182 (3d Cir. 1997)).

We are bound by our court's prior decision in Tiedeman, which now requires petitioner to meet the certificate of appealability requirements set forth in 28 U.S.C. § 2253(c). In the absence of a Supreme Court decision or an *en banc* decision from this court overruling Tiedeman, we lack jurisdiction to consider the merits of petitioner's claims for relief other than his

ineffective assistance of counsel claims related to the admission of Dunlap's eyewitness identification testimony.

Ineffective assistance of counsel

Petitioner interprets Th district court's order granting the certificate of appealability as allowing him to argue the ineffectiveness of both his trial counsel and his appellate counsel in the underlying criminal matter. Because the district court's order granting the certificate of appealability is ambiguous in this respect, we review both ineffective assistance claims advanced by petitioner.

"In determining whether to grant habeas relief, we review the district court's conclusions of law de novo and its findings of fact for clear error." Harris v. Bowersox, 184 F.3d 744, 748 (8th Cir. 1999)(quoting Bounds v. Delo, 151 F.3d 1116, 1118 (8th Cir. 1998)). The state courts' factual findings are entitled to a presumption of correctness. Id.[6]

> An ineffective assistance of counsel claim presents a mixed question of law and fact. . . . "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [relevant proceeding] cannot be relied on as having produced a just result." [The petitioner] must show that counsel's performance was deficient

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[6]Because petitioner filed his habeas petition before the effective date of the AEDPA, we review state court findings of fact under the pre-AEDPA standard, which entitles such findings to a presumption of correctness. See Bounds v. Delo, 151 F.3d 1116, 1118 n.3 (8th Cir. 1998)(cited in Harris v. Bowersox, 184 F.3d 744, 748 (8th Cir. 1999)).

> and prejudiced his defense. . . . Once deficient performance has been established, petitioner must demonstrate "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different."

Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999)(citations omitted).

Petitioner argues that his trial counsel's performance was deficient because counsel failed to move to suppress Dunlap's eyewitness identification testimony and all references to Dunlap's pretrial photographic identification and further failed to object to such evidence at trial. Petitioner argues that his appellate counsel's performance was deficient because counsel failed to argue that the admission of Dunlap's eyewitness identification testimony was plain error. Petitioner maintains that he has shown prejudice at both levels because there is reasonable probability that (a) Dunlap's eyewitness identification testimony would have been excluded if the issue had been properly raised in the trial court and (b) the admission of that testimony would have been deemed plain error if the issue had been properly raised on appeal. We disagree.

As indicated above in order to establish a constitutional basis for habeas relief, petitioner must show prejudice under the standards of Strickland v. Washington, 466 U.S. 668 (1984)(cited in Kellogg v. Skon, 176 F.3d at 451). To do that in the present case, petitioner must demonstrate that the admission of Dunlap's eyewitness identification testimony resulted in a deprivation of his due process rights and, therefore, it is reasonably probable that, but for his counsel's failure to challenge that evidence, the result of the proceedings would have been different.

> A conviction based on eyewitness identification at trial will be set aside only when pretrial identification procedures were so impermissibly suggestive that they give rise to a very substantial likelihood of irreparable harm. The central question is whether, under the totality of the circumstances, the identification was reliable despite any suggestive or inappropriate pre-trial identification techniques. The factors to consider in evaluating the likelihood of misidentification include: the opportunity a witness has to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

Trevino v. Dahm, 2 F.3d at 833 (footnote and citations omitted).

Upon review of the district court's findings of fact and conclusions of law, we hold that the district court did not clearly err in finding that Dunlap knew petitioner prior to the shooting, the blue van had been moving slowly with the door open, and the circumstances were such that Dunlap would have paid close attention to the events around him. See slip op. at 7-8. We agree with the district court's conclusion that Dunlap's in-court identification was reliable under the totality of the circumstances despite any suggestive or inappropriate pretrial identification procedures. Thus, upon de novo review, we hold that no due process violation occurred as a result of Dunlap's in-court identification of petitioner or his testimony regarding the pretrial photographic identification procedures used at the

police station. Accordingly, petitioner suffered no prejudice as a result of either his trial counsel's or his appellate counsel's failure to challenge the admission of Dunlap's eyewitness identification testimony. Petitioner's ineffective assistance claims fail as a matter of law.

Conclusion

For the reasons stated, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TERRANCE E. JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-0126-CV-W-1
	)	
JAMES A. GAMMON, and JEREMIAH NIXON,	)	
	)	
	)	
Respondent.	)	

ORDER

Pending before the Court is Petitioner Terrance E. Jackson's motion for a certificate of appealability. Jackson files this motion pursuant to 28 U.S.C. § 2253(c)(2). Jackson seeks a certificate of appealability on each of the issues raised in habeas petition and on the district court's denial of an evidentiary hearing for his petition. The Court has considered the parties briefs on this motion and on Jackson's underlying habeas petition. For the following reasons, Jackson's request for a certificate of appealability is GRANTED IN PART and DENIED IN PART.

I. STANDARD FOR CERTIFICATE OF APPEALABILITY

After April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), petitioners are required to obtain a certificate of appealability before they can appeal the denial of habeas corpus

petition filed under 28 U.S.C. § 2254 or a petition filed under 2255. See U.S.C. § 2253. Petitioners may obtain certificates of appealability from a district court or circuit judge. Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998). The same substantive standard governs issuance of the pre-AEDPA certificate of probable cause and the post-AEDPA certificate of appealability. Id. (citing Roberts v. Bowersox, 137 F.3d 1062, 1068 (8th Cir. 1998); Tiedeman v. Benson, 122 F.3d 518, 521 (8th Cir. 1997)).

To grant a certificate of appealability, a district court must find a substantial showing of the denial of a federal constitutional right. 28 U.S.C. § 2253(c)(2); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), petition for cert. filed, No. 97-9013(U.S. May 5, 1998)[1](citing Tiedeman, 122 F.2d at 522). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." Cox, 133 F.3d at 569; Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir.), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L. Ed. 2d 309(1994)).[2] A certificate must also specify which of the applicant's claims satisfy the foregoing test, 28 U.S.C. § 2253(c)(3), and appellate review is limited to the issues specified in the certificate of appealability. Carter v. Hopkins, 151 F.3d 872, 874 (8th Cir. 1998)(citing Ramsey, 149 F.3d at 759)).

II. JACKSON'S CLAIMS

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[1] See also Carson v. Director of Iowa Dept. of Correctional Services, 150 F.3d 973,975 (8th Cir. 1998); Ramsey, 149 F.3d at 760; Roberts, 137 F.3d at 1068.

[2] Same standard adopted by the Eastern District of Missouri. See Tokar v. Bowersox, 1 F.Supp.2d 986 (E.D. Mo. 1998); Leisure v. Bowersox, 990 F. Supp. 769, 829 (E.D. Mo. 1998).

Jackson raised four separate claims in his 28 U.S.C. § 2254 habeas corpus motion. In each of his four claims, Jackson claims he was denied due process because of the ineffective assistance of counsel. Jackson claims that his trial counsel was ineffective in: (1) failing to object to the admission of evidence of other uncharged crimes, and (2) failing to object to the prosecutors use of inflammatory and prejudicial statements. Jackson also claims that his appellate counsel was ineffective in (1) failing to object to the admission of improper eyewitness identification testimony; and (2) failing to object that the evidence was insufficient to support Jackson's conviction. Jackson also seeks a certificate of appealability on the Court's denial of an evidentiary hearing.

The Court does not believe that either of Jackson's claims regarding the ineffectiveness of his trial counsel, nor his claim regarding the failure of appellate counsel to object to the sufficiency of the evidence, nor the denial of a § 2254 evidentiary hearing are debatable among reasonable jurists, could be resolved differently by another court, or deserve further proceedings. The Court, therefore, denies Jackson's request for a certificate of appealability on these points. The Court, however, does believe that reasonable jurists may differ in considering Jackson's claim that his appellate counsel was ineffective in not objecting to the admission of the eyewitness identification testimony in his case. The Court will grant a certificate of appealability on this issue only.

III. CONCLUSION

For the reasons stated above, it is hereby ORDERED that Jackson's motion for a certificate of appealability is GRANTED IN PART and DENIED IN PART. The Court GRANTS Jackson a certificate of appealability on the issue of whether his appellate counsel was ineffective in failing to object to the admission of the eyewitness identification testimony at

trial. The request for certificate of appealability is DENIED as to all other issues.

IT IS SO ORDERED.

/S/

Dean Whipple
United States District Judge

Date: 12-30-1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TERRANCE E. JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-0126-CV-W-1
	)	
JAMES A. GAMMON, and	)	
JEREMIAH NIXON,	)	
	)	
Respondent.	)	

AMENDED ORDER

Petitioner Terrance Jackson filed a motion to reconsider with this Court on November 1, 1996. This motion sought reconsideration of the Court's October 23, 1996, Order denying Jackson's motion for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The Court denied Jackson's motion for reconsideration on December 1, 1997.

While it is troubling that a series of clerical and filing errors delayed the Court's ruling upon this motion, of greater concern, is the fact that the Court has been unable to confirm whether either party ever received a copy of the Court's December 1, 1997, Order. While this Order was docketed in the Court's computer system, it is standard practice in the United States District Court of the Western District of Missouri for the Clerk of Court to mail all court orders to each party. The Court believes that an error in the Clerk 's Office may have prejudiced the parties and prevented them from receiving proper notice in this case. Accordingly, it is hereby

ORDERED that the filing date of the Court's December 1, 1997, Order is AMENDED by this Order. It is further

ORDERED that the Court will consider the date of this Order as the applicable filing date of the ruling contained in its December 1, 1997, Order. The Court will apply the filing date of this Order to determine any time deadlines or limitation periods triggered by the ruling of its December 1, 1997, Order.

IT IS SO ORDERED.

/S/

Dean Whipple
United States District Judge

Date: 7-08-98

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TERRANCE E. JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-0126-CV-W-1
	)	
JAMES A. GAMMON,	)	
Superintendent,	)	
Moberly Correctional Center,	)	
	)	
and	)	
	)	
JEREMIAH NIXON,	)	
Attorney General, State of Missouri,	)	
	)	
Respondents.	)	

ORDER

Pending before the Court is Petitioner's motion to reconsider, filed pursuant to Federal Rule of Civil Procedure 59(e), wherein Petitioner requests that this Court reconsider its October 23, 1996, Order which denied Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

A motion under Federal Rule of Civil Procedure 59(e) to alter or amend a judgment draws into question the correctness of a judgment. Norman v. Arkansas Dept. of Educ., 79 F.3d 748, 750 (8th Cir. 1996). Rule 59(e) was adopted to codify the district court's power to rectify its own mistakes in the period immediately following the entry of judgment. Id. For example, such a motion is appropriate in

cases where the court has based an order on a factual error. Id. However, the fact that the court made a mistake is not, by itself, enough to warrant granting a Rule 59(e) motion. Id. Relief under Rule 59(e) is generally available only when a manifest error affects the correctness of the judgment. Id. Moreover, a Rule 59(e) motion to alter or amend judgment cannot be used to raise arguments which could and should have been raised prior to the issuance of judgment. Garner v. Arvin Industries Inc., 77 F.3d 255, 258 (8th Cir. 1996). Specifically, a Rule 59(e) motion cannot serve as the occasion to tender new legal theories for the first time. Concordia College Corp. v. W.R. Grace & Co., 999 F.2d 326, 330 (8th Cir. 1993), cert denied, 510 U.S. 1093, 114 S. Ct. 926, 127 L.Ed.2d 218 (1994).

Rule 59(e) can be used to ask that a judgment be set aside in its entirety. Forman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed.2d 222 (1962). Generally, Rule 59(e) allows reconsideration of matters properly encompassed in a decision on the merits. White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 1166, 71 L. Ed.2d 325 (1982). A motion to alter or amend under Rule 59(e) must rely on one of three major grounds: 1) an intervening change in controlling law; 2) the availability of new evidence not available previously; or 3) the need to correct a clear error of law or prevent manifest injustice. Bannister v. Armontrout, 807 F.Supp. 516 (W.D. Mo. 1991)(citations omitted).

Considering the motion pursuant to Rule 59(e), the Court concludes that 1) there has been no intervening change in controlling law; 2) Jackson has not established the availability of new evidence that was not available previously; and 3) there was no clear error of law or manifest injustice in denying Jackson's request for writ of habeas corpus. The Court finds that Jackson has merely challenged the Court's interpretation of the evidence and the Court's weighing of the evidence in its determination that the testimony offered at the trial did not

"fatally infect" the entirety of the trial. Jackson has not presented the Court with any previously unconsidered evidence. Jackson also fails to indicate that the Court has made either a factual or a legal mistake in rendering its Order. After due consideration of the issues presented by Petitioner in his motion, it is hereby

ORDERED that Petitioner's Motion to Reconsider is DENIED. It is further

ORDERED that, given the unusual delay in the Court's issuing of this opinion, the Clerk of the Court is directed to send a copy of this Order to all names parties in this case.

Dean Whipple
United States District Judge

Date: 12-01-97

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

Terrance E. Jackson	)	
	)	
Plaintiff(s),	)	
v.	)	No. 96-0126-CV-W-1
	)	
James A. Gammon, et al.	)	
	)	
Defendant(s).	)	

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ **Decision by Court**. This action has come before the Court as a briefed matter and a decision has been rendered.

IT IS ORDERED that

the Court hereby **DENIES** Petitioner's motion for an evidentiary hearing, and

DENIES Petitioner's petition for relief under 28 U.S.C. 2254 on all grounds presented.

October 23, 1996
Date

R. F. Connor
Clerk
/S/
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

TERRANCE E. JACKSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-0126-CV-W-1
	)	
JAMES A. GAMMON, Superintendent, Moberly Correctional Center,	)	
	)	
and	)	
	)	
JEREMIAH NIXON, Attorney General, State of Missouri,	)	
	)	
Respondents.	)	

ORDER

Pending before the court is Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was accused of firing a gun into a crowd from a van driving down a street at 1 a.m. He was convicted of one count of second degree murder, two counts of armed criminal action, and one court of first degree assault. Petitioner was sentenced to four consecutive life sentences. His petition presents four separate arguments: (1) the court admitted, and Petitioner's counsel should have objected to the admission of, evidence of other uncharged crimes, namely, shoot-outs that allegedly involved Petitioner and some of the state's witnesses; (2) the

court allowed, and Petitioner's counsel should have objected to, the prosecutor's inflammatory and prejudicial statements and arguments before the jury, namely, the theme that Kansas City is suffering from an ongoing gang war of which Petitioner was a combatant; (2) the court allowed, and Petitioner's counsel should have objected to, the admission of improper eyewitness identification testimony; and (4) the evidence was insufficient to support Petitioner's conviction, and his counsel failed to raise this issue. Petitioner also moves for an evidentiary hearing on the motion. For the reasons given below, the Court denies the motion for an evidentiary hearing and denies the petition on all grounds.

I. EVIDENCE OF PRIOR SHOOT-OUTS

At Petitioner's trial, Arlvelt Bruster and Eric Dunlap testified that Petitioner (or people associated with Petitioner) had engaged in shoot-outs against them before the crimes with which Petitioner was charged and later convicted. Bruster and Dunlap were in the crowd into which Petitioner was alleged to have fired his gun. Petitioner's counsel did not object to this testimony.

Petitioner objects that the admission of Bruster's and Dunlap's testimony violates Missouri's rule that evidence of uncharged crimes is inadmissible if used solely to show the defendant's propensity to commit such crimes. State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993) (en banc). Specifically, Petitioner objects that the admission of this testimony was plain error and that this testimony and his trial counsel's failure to object to the testimony violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Respondents agree that Petitioner has exhausted his state remedies as to these and all other claims.

The Court agrees with Respondent that Bruster's and Dunlap's testimony regarding the shoot-outs was admissible.

The Missouri Court of Appeals found the testimony admissible because it tended to prove Petitioner's motive for firing into the crowd in which Bruster and Dunlap were located. State v. Jackson, Nos. WD 42,811 & WD 45,083, slip op. at 3-4 (Mo. Ct. App. 1992), reprinted in App. 152-53. On habeas corpus review, the Court does not review whether a state court's evidentiary ruling is correct according to state law. Rather, "we will reverse a state court evidentiary ruling only if the 'petitioner . . . show[s] that the alleged improprieties were "so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair.' To carry that burden, the petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial --- i.e., that absent the alleged impropriety the verdict probably would have been different." Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995).[1] The Court finds that the Missouri courts' evidentiary rulings, even if contrary to state law or the Constitution, were not "so egregious that they fatally infected the proceedings and rendered [Petitioner's] entire trial fundamentally unfair." Id. In fact, Petitioner's own brief shows the lack of egregiousness or prejudice when it quotes the prosecutor's statement of trial: "'If you don't like Eric Dunlap and Arlvelt Bruster because they're part of the gang war, fine.'" Pet. at 20 (quoting Tr. at 665). The prosecutor recognized what the Court recognizes here, that Dunlap's and Bruster's testimony of the shoot-outs could have undermined their own credibility as much as it could have convicted Petitioner. The admission of that testimony, then, was not so prejudicial that it could ave rendered the entire trial fundamentally unfair. And even though a limiting instruction might have been appropriate, the failure to give one did not

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[1]Although the Court need not even consider the question, it notes that the Missouri Court of Appeals decided the evidentiary question correctly under state law. See State v. Mallett, 732 S.W.2d 527, 534-36 (Mo.) (en banc), cert. denied, 484 U.S. 933, 108 S.Ct. 309, 98 L. Ed.2d 267 (1987).

poison the trial, given the fact that the testimony could have undermined that state's case on its own. Nor was Petitioner's counsel ineffective for failing to object to this evidence. Petitioner's grounds one and two are therefore rejected on all bases asserted by Petitioner.

II. THE PROSECUTOR'S THEME OF GANG WARFARE

Petitioner's grounds three and four are based on the prosecutor's continual reference about Petitioner's involvement in street or gang wars from the start of the trial to its finish. The question before this Court is whether the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'". Harper v. Grammar, 895 F.2d 473, 482 (8th Cir. 1990) (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L. Ed.2d 144, 157 (1986)). The Missouri Court of Appeals found the prosecutor's arguments acceptable because a prosecutor may call on jurors' common experience, argue about the prevalence of crime in a community, and appeal to jurors as representatives of the community (as opposed to arguing that the defendant poses a personal danger to the jurors individually). State v. Jackson, Nos. WD 42.811 & WD 45,083 slip op. at 4 (Mo. Ct. App. 1992), reprinted in App. 153. This Court agrees with the Missouri Court of Appeals and further finds that the prosecutor's remarks did not so infect the trial with unfairness as to make the resulting conviction a violation of due process. As a result, it is of no consequence that Petitioner's counsel did not object to the prosecutor's remarks. Petitioner's grounds three and four are therefore rejected on all bases asserted by Petitioner.

III. IMPROPER EYEWITNESS TESTIMONY

Petitioner's ground six claims that the state court allowed, and Petitioner's trial and appellate counsel should have objected to, the admission of improper eyewitness identification testimony. The standards for deciding this issue on habeas review are as follows:

> A conviction based on eyewitness identification at trial will be set aside only when pre-trial identification procedures were so impermissibly suggestive that they give rise to a very substantial likelihood of irreparable harm. The central question is whether, under the totality of the circumstances, the identification was reliable despite any suggestive or inappropriate pre-trial identification techniques. The factors to consider in evaluating the likelihood of misidentification include: the opportunity a witness has to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and confrontation.

Trevino v. Dahm, 2 F.3d 829, 833 (8th Cir. 1993) (footnote and citations omitted). Petitioner suggests that the pre-trial identification by Eric Dunlap should be set aside because

> Mr. Dunlap was shown photographs purporting to be Mr. Jackson[, the Petitioner,] but which were not [of Petitioner]. He was left alone in a room with photographs that had the names of individuals on the backs. One of the photographs was identified as [Petitioner,] "T. Jackson." Mr. Dunlap picked that photograph,

> although he later admitted that he had done so only because of the name on the back. When questioned, he indicated that the [first identified] photograph really did not look like Mr. Jackson and identified him once again.

Pet. at 6. For the sake of judicial economy, the Court proceeds to the merits without regard to the procedural posture.

Respondent argues that (1) this identification procedure was not impermissibly suggestive but rather benefited Petitioner, and (2) the totality of the circumstances made the identification reliable notwithstanding any suggestive or inappropriate pre-trial identification techniques because (a) Mr. Dunlap had known Petitioner for three years prior to the identification and (b) the circumstances under which Mr. Dunlap saw Petitioner led to a high degree of attention. Respondent's first proposition, that the station-house procedure (affixing Petitioner's name to a picture of someone else) benefited rather than harmed Petitioner, could go either way. Respondent's second proposition is more convincing. Mr. Dunlap's previous familiarity with Petitioner obviously raises the reliability of the pre-trial identification. So do the circumstances: Mr. Dunlap testified that he noticed a blue van moving slowly toward the scene, he could identify certain people in the van (including Petitioner) but not others, he saw Petitioner in back of the van with something in his hands while shots came from the van, and he, Dunlap, ducked down and hid behind a car during the shooting. See Pet'r's Statement of Facts para. 10-12, at 5-6. These facts especially the fact that the van was moving slowly, indicate that Mr. Dunlap paid a high degree of attention during the crime. The Court agrees with Respondent that "under the totality of the circumstances, the identification was reliable despite any suggestive or inappropriate pre-trial identification techniques". Trevino, 2 F.3d at 833. This being the case, Petitioner's counselors did not

render ineffective assistance when they failed to raise this issue. Consequently, Petitioner's ground six for relief is rejected on all bases asserted by Petitioner.

IV. SUFFICIENCY OF THE EVIDENCE

Petitioner's ground five claims relief because the evidence was insufficient to support a finding of guilt beyond a reasonable doubt and because Petitioner's appellate counsel was ineffective for failing to raise this ground on appeal. The case against Petitioner rested on the eyewitness testimony of Messrs. Dunlap and Bruster because other eyewitnesses did not see who was in the van. Hair exemplars from the van did not match Petitioner. Petitioner relied on an alibi provided by his grandmother and the theory that Dunlap and Bruster misidentified him.

Respondent argues that there was sufficient evidence to uphold Petitioner's conviction because the Missouri Court of Appeals upheld the sufficiency of the evidence against Michael Hamilton, another occupant of the van during the crime, on a less compelling adverse case. See State v. Hamilton, 817 S.W. 2d 8, 10-11 (Mo. Ct. App. 1991). Respondents overstate their position: while the eyewitness testimony was less adverse to Hamilton (who was identified conclusively by only one eyewitness against two eyewitnesses identifying Petitioner), the alibi testimony was more adverse to Hamilton (whose alibi, his girlfriend, did not back him up while Petitioner's alibi, his grandmother, did stand by him). See id. Therefore, it is more accurate to say that Petitioner and Hamilton had comparable cases against them, and on that basis Petitioner's argument against the sufficiency of the evidence must be rejected. The jury was free to believe Dunlap and Bruster, free to reject Petitioner's alibi witness, and free to convict on the evidence presented. See id. at 11 ("The testimony of a single witness may be sufficient to constitute substantial evidence to make a

submissible case."). The Missouri Court of Appeals would have been no more receptive to Petitioner's argument against the sufficiency of the evidence than they were in Hamilton, and this Court would uphold that decision. This being the case, Petitioner's counselors did not render ineffective assistance when they failed to raise this issue. Consequently, Petitioner's ground five for relief is rejected on all bases asserted by Petitioner.

ORDER

For the reasons give above, the Court hereby DENIES Petitioner's motion for an evidentiary hearing, and DENIES Petitioner's petition for relief under 28 U.S.C. § 2254 on all ground presented.

IT IS SO ORDERED

/S/

Dean Whipple
United States District Judge

Date: 10-23-96

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1330WMKC

Terrance E. Jackson,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and for
James A. Gammon, Superintendent,	*	En Banc
Moberly Correctional Center,	*	
Jeremiah Nixon, Attorney General,	*	
State of Missouri,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

January 6, 2000

Order Entered at the Direction of the Court:

/S/

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

January 28, 2000

Ms. Patricia L. Brune
Clerk
U.S. DISTRICT COURT, WESTERN MISSOURI
Room 1510
400 E. Ninth Street
Kansas City, MO 64106

Re: 99-1330WMKC Terrance E. Jackson vs. James A. Gammon

Dear Clerk:

The mandate of this Court is being sent to the clerk of the district court, together with a receipt. The clerk of the district court is requested to sign, date, and return the receipt to this office.

The district court records in this court's possession will be returned shortly.

(5175-010199)

Sincerely,

/S/
Michael E. Gans
Clerk of Court

kas

Enclosure

(LETTER FOR INFORMATIONAL PURPOSES ONLY)

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cc: Charles E. Atwell
Cheryl Ann Pilate
Michael Joseph Spillane
Jeremiah W. (Jay) Nixon

District Court/Agency Case Number(s): 96-0126-CV-W-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TERRANCE E. JACKSON	)	
	)	
Appellant,	)	
	)	Case No. 99-1330
v.	)	
	)	
JAMES A. GAMMON, et al.,	)	
	)	
Appellees.	)	

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Appellant Terrance E. Jackson, by and through counsel, hereby requests that this Court grant him a certificate of appealability as to each of the issues stated in his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Mr. Jackson wishes to appeal the denial of all of his claims to this Court. He submits that the district court erred in granting a limited certificate of appealability. The certificate restricted him to one issue, namely, the violation of his right to the effective assistance of appellate counsel for failure to challenge the admission of improper eyewitness identification testimony. As stated below, Mr. Jackson submits that his other claims, stated in his Petition for Writ of Habeas Corpus, meet the statutory standard for appeal as they involve "a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2).

Mr. Jackson, thus, requests that this Court issue him an expanded certificate of appealability extending to all issues as discussed below. In further support of his request, he states as follows:

MEMORANDUM IN SUPPORT

I. PROCEDURAL BACKGROUND

On January 30, 1996, Petitioner filed his Petition for Writ of Habeas Corpus and incorporated memorandum in support, pursuant to 28 U.S.C. § 2254. This Court issued a show cause order, and Appellees subsequently filed their suggestions in opposition. Petitioner then timely filed his traverse.

On October 23, 1996, this Court entered an order rejecting Petitioner's claims pertaining to ineffective assistance of counsel and the violation of Mr. Jackson's constitutional rights to due process and a fair trial. Petitioner subsequently filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) on November 1, 1996. He also filed a supplement to that motion on November 25, 1996. The district court denied Mr. Jackson's motion.

Petitioner subsequently filed a timely notice of appeal and request for certificate of appealability in the district court. On December 30, 1998, the district court issued an order granting in part and denying in part Petitioner's request for a certificate of appealability. The district court failed to certify Mr. Jackson's request to appeal the following claims: (1) ineffective assistance of counsel and violation of the rights to due process and a fair trial for failing to object to the admission of evidence of uncharged crimes; (2) ineffective assistance of counsel and violation of the rights to due process and a fair trial for failing to object to the prosecutor's use of inflammatory and prejudicial statements; and (3) ineffective assistance of appellate counsel for failing to argue on appeal that the evidence was insufficient to support Petitioner's conviction. The district court also denied a certificate of appealability as to its denial of an evidentiary hearing. The

district court restricted its certificate of appealability to Petitioner's claim that appellate counsel was ineffective for failing to challenge on appeal the admission of improper eyewitness identification testimony.

Petitioner now seeks to appeal from the denial of all of his claims and requests that this Court grant a certificate of appealability as to all issues presented in his Petition for Writ of Habeas Corpus, as presented below.

II. STANDARDS APPLICABLE TO CERTIFICATES OF APPEALABILITY

As this Court is aware, Section 2253 of Title 28 requires a state prisoner to obtain authorization from the court before appealing from the denial of a federal habeas petition. Before the 1996 habeas amendments, Section 2253 required a state prisoner to obtain a certificate of probable cause. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") amended Section 2253 to require a state prisoner to obtain a "certificate of appealability." See 22 U.S.C. § 2253(c).

The same substantive standard governs issuance of a certificate of appealability as governed the certificate of probable cause. Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998). See also Roberts v. Bowersox, 137 F.3d 1062, 1068 (8th Cir. 1998); Tiedeman v. Benson, 122 F.3d 518, 521 (8th Cir. 1997). A certificate of probable cause and a certificate of appealability both require that the applicant make "a substantial showing of the denial of a constitutional right." Ramsey, 149 F.3d at 759. The only change under the habeas amendments is that a certificate of appealability requires the court to specify which issues satisfy the statutory standard, and appellate review is limited to the issues so certified. Id. See also 28 U.S.C. § 2253(c)(3). In contrast, the pre-AEDPA certificate of probable cause did not require specification of

individual issues and served to place the entire case before the court of appeals. Ramsey, 149 F.3d at 759.

Petitioner Jackson recognizes that the prevailing law in this circuit is stated in Tiedeman and Ramsey. However, he submits that those opinions are wrongly decided. He asserts that Tiedeman, in particular, is internally inconsistent and squarely conflicts with the Supreme Court's decision in Lindh v. Murphy, 117 S. Ct. 2059 (1997). He also submits that Tiedeman runs counter to the decisions of other circuits that have considered the applicability of the habeas amendments to cases that were filed, as Mr. Jackson's was, prior to enactment of the AEDPA. In fact, the cases of other circuits have singled out Tiedeman as the lone appellate decision requiring the issuance of a certificate of appealability in cases predating the AEDPA. See, e.g., United States v. Kunzman, 125 F.3d 1363, 1364-65 n. 2 (10th Cir. 1997) (explicitly rejecting Tiedeman and joining majority of circuits in holding that petitioners whose cases predate the AEDPA do not need certificates of appealability); United States v. Skandier, 125 F.3d 178, 182 (3d Cir. 1997) (stating that Tiedeman runs counter to the reasoning of Lindh).

Petitioner Jackson asserts that Tiedeman is wrongly decided, and its reasoning should be rejected by this Court. He submits that because the district court has certified his appeal as to one issue, he should be permitted to appeal *all* issues to this Court. In other words, he submits that a certificate of appealability should have the same effect as a certificate of probable cause because his case was filed before the AEDPA. He, therefore, asserts that he should be permitted to appeal the denial of all of his claims to this Court. Alternatively, he submits that all of his claims meet the statutory standard requiring a "substantial showing of the denial of a constitutional right." Because all of his claims satisfy this standard, this Court should issue an expanded certificate of appealability extending to each and every issue that he presented in his Petition for Writ

of Habeas Corpus, including his request for an evidentiary hearing in the district court.

III. ALL OF PETITIONER'S CLAIMS INVOLVE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT

Mr. Jackson submits that any review of his claims quickly establishes that he is entitled to a certificate of appealability as to all of his issues because he has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c). A habeas petitioner satisfies the requisite standard if he demonstrates "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880 (1983). Mr. Jackson submits that each and every issue as argued below satisfies the requisite standard as stated in 28 U.S.C. § 2253(c) and as defined in Barefoot.

In further support of his request for a certificate of appealability, Mr. Jackson respectfully refers this Court to the argument contained below which is a condensed version of the arguments contained in his Petition for Writ of Habeas Corpus. A review of these claims quickly establishes that he has more than satisfied the requisite standard for appealing all claims as well as the denial of his request for an evidentiary hearing to this Court.

A. Summary of Facts and Authorities Supporting Petitioner's Request for Certificate of Appealability.

1. Procedural Statement of the Case

Terrance E. Jackson seeks a writ of habeas corpus after all state remedies have been exhausted. Mr. Jackson was convicted of one count of murder in the second degree in violation of R.S.Mo § 565.021.1, two counts of armed criminal action in violation of R.S.Mo. § 571.015.1, and one count of assault in the first degree in violation of R.S.Mo. § 558.011.1 on August 31, 1989.

On September 30, 1988, a felony indictment was filed in the Circuit Court of Jackson County, Missouri, charging Mr. Jackson with the violations listed above. Mr. Jackson was arraigned on October 13, 1988. Bond was set at $250,000. Mr. Jackson entered a plea of not guilty on October 13, 1988. On July 10, 1989, trial by jury commenced in the Circuit Court of Jackson County, Missouri. That trial resulted in a mistrial as to Defendants Terrance Jackson and Michael Hamilton. Co-defendant Leroy Hudson was convicted of second degree murder and Defendant Michael Sanders was found not guilty.

A new trial by jury of only Mr. Jackson commenced in the Circuit Court of Jackson County, Missouri, on August 28, 1989. Tr. at 3. Following the conclusion of the State's case, Mr. Jackson filed a Motion for Judgment of Acquittal, which was denied by the Court. Tr. at 583. Mr. Jackson orally renewed his Motion for Judgment of Acquittal at the close of all evidence which the trial court denied. Tr. at 625. After submission of instructions and closing arguments by the parties, the jury began deliberations, and on August 31, 1989, returned a verdict of guilty on all four counts, with a recommended sentence of life for each count. Tr. at 678.

Petitioner timely filed a Motion for Judgment of Acquittal and New Trial. On November 8, 1989, the trial court, after denying Petitioner's Motion for Judgment of Acquittal and New Trial, sentenced Petitioner to a term of four life sentences to be served consecutively. Tr. at 691.

Following the verdict on November 9, 1989, Mr. Jackson filed a Notice of Appeal to the Missouri Court of Appeals, Western District. On May 31, 1990, with his appeal pending, Mr. Jackson filed a pro se motion to set aside the judgment and conviction pursuant to Mo. R. Crim. P. 29.15, raising issues of ineffective assistance of counsel, error in the admission of other crimes evidence, unreliable identification evidence, and error in admission of evidence not linked to him. The Court denied Petitioner's 29.15 motion on June 14, 1991, after it held an evidentiary hearing. Mr. Jackson then pursued his consolidated appeal, which included the appeal of his conviction and the appeal of the denial of his Rule 29.15 motion, in the Missouri Court of Appeals.

Petitioner's conviction was affirmed by the Missouri Court of Appeals, Western District, on June 30, 1992. In his appeal, Mr. Jackson raised issues including the error of admitting evidence of other crimes, prosecutorial misconduct, and ineffective assistance of counsel.

On July 20, 1995, Mr. Jackson filed his Motion to Recall the Mandate in the Missouri Court of Appeals, Western District. The motion raised claims of ineffective assistance of appellate counsel for failure to raise on appeal the issue of insufficiency of evidence, and for failure to raise on appeal the issue of unconstitutionally suggestive identification procedures. An amended motion raising the same issues was filed on July 28, 1995. The Court denied the Motion on August 29, 1995.

B. Introductory Facts

On the evening of September 13, 1988, Eric Dunlap and Steve White were playing basketball in the park at 35th and Wabash in Kansas City, Missouri. Tr. at 210. After they played basketball for a short time, they walked to the corner of 35th and Wabash where they talked with Roger Murray. Tr. at 212. While talking with Murray and White, Dunlap noticed Arlvelt Bruster walking down the sidewalk. Tr. at 213. In addition, Dunlap saw several other people in the park that evening, including his cousins Louis "L.C." Dunlap and Robert Wright, one of the victims in this case. Tr. at 214.

As these men were talking, Dunlap noticed a blue van approaching on Wabash. Tr. at 216. Dunlap testified that the van was moving slowly down the street, and he noticed that the sliding door on the van was open. Tr. at 216. Dunlap testified that he looked into the van and saw people he knew. Tr. at 216-17. He stated that he knew Leroy Hudson and that Hudson was driving the van. Tr. at 217. He also testified that he knew Terrance Jackson, who he said was seated in the middle of the van. Tr. at 218. He further testified that he also recognized a big guy who he said looked like Michael Hamilton, who he said was seated on one side of Mr. Jackson. Tr. at 218. Dunlap testified that there were other individuals who he did not recognize in the van. Tr. at 218.

Dunlap testified that, as he watched, the van continued toward the corner of 34th and Wabash. Tr. at 217. He testified that he saw shots coming from the van and that he believed that Mr. Jackson had something in his hand in the back of the van but he could not tell what it was. Tr. at 217. He could not state with any certainty that Mr. Jackson shot any gun from the van. Tr. at 217.

Dunlap testified that he ducked down and hid behind a car. Tr. at 218. He testified that as he began to stand up to see what was going on, he noticed a yellow Ford LTD driving behind the van. Tr. at 218-19. He testified that he recognized Fletcher Wiley, the driver of the car, but did not recognize the

other two people in the car. Id. Eric quickly ducked down again because there were gunshots coming from the yellow car. Tr. at 219. Dunlap testified that the shooting stopped and he heard someone say "Robert got shot." Tr. at 220. He testified that he then saw someone drive off with Robert. Tr. at 220.

After this incident, Dunlap went home to his grandmother's house and then proceeded to the hospital, Truman Medical Center. Tr. at 221-22. While at the hospital, Dunlap and Bruster discussed retaliation and decided that they would do whatever it took to get the men involved. Tr. at 399-400. From the hospital, Dunlap went with Arlvelt Bruster and Mike Powell to the police station. Tr. at 223.

Once at the police station, Dunlap and Bruster were shown a group of photographs. Dunlap initially picked out Mike Hamilton's photograph and then told the police detective that he could not make any other identification from the photographs. Tr. at 224. The detective then left Dunlap alone in the room with the photographs and told him to "keep looking at them." Tr. at 224. While alone, Dunlap looked on the back of the photographs and saw the names of Leroy Hudson and Terrance Jackson on two of the photographs. Tr. at 224. When the detective returned, Dunlap picked out those photographs as showing the suspects in the shooting. Tr. at 225. The police detective then told Dunlap that the photographs were not of Leroy Hudson and Terrance Jackson, but were of other individuals. Tr. at 267. Dunlap indicated at trial that the photographs did not look like either of the two men. Tr. at 226. He later picked out the correct photographs of Jackson and Hudson. Tr. at 228.

Arlvelt Bruster also testified at the trial. He testified that he, too, had seen the blue van approaching on 35th Street. Tr. at 352. He testified that he saw Hudson, Hamilton, Jackson and Sanders in the van and that Hudson was driving. Id. He also testified that the three men in the back, Hudson, Hamilton and Jackson, were holding something in their hands, but Bruster

could not tell what it was. Tr. at 353. He testified that he saw "fire" coming from the van, and then he ran behind a building to hide. Tr. at 353. When the shooting stopped, Bruster emerged and saw a gold LTD following the van. He identified the car as that of Fletcher Wiley. He testified that Wiley and an Edward Buford were leaning out of the windows, shooting. Tr. at 355, 364.

L.C. Dunlap testified at trial that he and Robert Wright were walking to Renauld Shelton's car when he heard the gunshots. Tr. at 325-26. He did not initially see where the shots were coming from. Tr. at 326. He and Wright "hit the ground" when they heard the shots and when he looked up, he saw the light blue van driving away. Tr. at 326. He testified that he then saw gunfire coming from the location of three individuals seated in the back of the van. Tr. at 328. He testified that he did not see who was seated in the van. Tr. at 335. He also testified that he did not see if any second vehicle drove by. Tr. at 335.

Robert Wright died shortly after reaching the hospital. The doctor performing the autopsy testified that a single gun shot wound to the head and neck had caused his death. Tr. at 501.

Another individual, Carl Washington, was injured that evening. Mr. Washington was leaving the park when he was shot in his hip. Tr. at 313. He did not see who shot him nor did he see any cars in the area when he was shot.

Mr. Jackson's grandmother, Ella B. Jackson, testified that Mr. Jackson had returned home on the night in question at approximately 12:40 a.m. Tr. at 600. She also testified that when she got up the next morning, her grandson was still lying on the couch where she had left him the night before. Tr. at 602.

The jury convicted Terrance Jackson of murder in the second degree, assault in the first degree, and two counts of armed criminal action. Tr. at 678-79. He was sentenced to life

on each count. Id. These four life sentences were ordered to be served consecutively by the Court. Tr. at 691.

B. Respects in Which Petitioner's Constitutional Rights Have Been Violated.

Terrance E. Jackson was convicted and sentenced in violation of his rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in the following respects:

1. Petitioner Was Denied a Fair Trial, Due Process of Law, and Effective Assistance of Counsel in Violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution in that Counsel Failed to Object to the Admission of Evidence of Other Uncharged Crimes.

Mr. Jackson was denied the effective assistance of counsel in that his trial attorney failed to object to the admission of evidence of prior bad acts, namely "shoot outs" that allegedly involved Mr. Jackson and some of the State's witnesses. The attorney's failure and consequent admission of this irrelevant and highly inflammatory evidence substantially prejudiced Mr. Jackson, violating his Constitutional rights to due process, a fair trial, and the effective assistance of counsel.

The standards governing ineffective assistance of counsel are well known to this Court. A criminal defendant's constitutional right to counsel is violated when the performance of his attorney falls below an objective standard of reasonableness and the attorney's errors created a reasonable probability that, but for those errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). The failure to provide effective assistance of counsel is a fundamental constitutional error that undermines the entire adversarial

process. See, e.g., Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

Although the Constitution does not require an attorney to raise every possible claim or make every possible argument on his client's behalf, counsel's failure to make an argument with significant merit may raise the inference that his or her performance fell beneath accepted constitutional standards. See, e.g., State v. Sumlin, 820 S.W.2d 487, 490 (Mo. banc 1991); see also United States ex rel. Partee v. Lane, 926 F.2d 694, 701-02 (7th Cir. 1991), cert. denied, 502 U.S. 1116 (1992)(Sixth Amendment requires attorney to serve as a "vigorous and devoted advocate" of his client's cause). Although a trial counsel's reasonable trial strategies cannot constitute ineffective assistance of counsel even if they are unsuccessful, Phyle v. Leapley, 66 F.3d 154, 156 (8th Cir. 1995); Flieger v. Delo, 16 F.3d 878, 885-86 (8th Cir.), cert. denied, 115 S. Ct. 355 (1994), the failure of the attorney to object to irrelevant, inflammatory, and unfairly prejudicial evidence cannot be deemed reasonable trial strategy. Cf. Griffin v. Delo, 33 F.3d 895 (8th Cir. 1994), cert. denied, 115 S. Ct. 1981 (1995) (when claim of ineffective assistance of counsel is based on failing to act, reasonableness of attorney's nonfeasance must be assessed in light of all the circumstances).

Mr. Jackson raised in his Rule 29.15 motion the claim that his trial attorney was ineffective based on his failure to object to the admission of evidence of uncharged crimes. The state post-conviction court rejected this claim on the basis that Mr. Jackson failed to establish that he was prejudiced by his attorney's errors. The Missouri Court of Appeals, Western District, also rejected this argument on the basis that such evidence was admissible because it tended to establish motive, and the trial court thus did not err in permitting testimony regarding previous shooting incidents.

Mr. Jackson submits that his attorney's failure to object to evidence of other uncharged crimes represented an egregious

professional error that cannot be deemed reasonable trial strategy. His attorney's failures constituted ineffective assistance of counsel and resulted in unfair prejudice to Mr. Jackson. Although concerns regarding the admissibility of evidence in a state trial are typically a matter of state law not reviewed by a federal court, Carlson v. State, 945 F.2d 1026, 1029 (8th Cir. 1991), a habeas petitioner is entitled to relief when the alleged error in admitting evidence is so prejudicial that it amounts to a denial of due process or infringes upon a specific constitutional protection. Id.; See also Hollins v. Dep't of Corrections, 969 F.2d 606, 609 (8th Cir. 1992); Lashley v. Armontrout, 957 F.2d 1495, 1499 (8th Cir. 1992), rev'd on other grounds, 507 U.S. 272 (1993).

In the present case, Mr. Jackson's right to due process was violated by the admission of the highly prejudicial evidence of prior "shoot-outs" and "gang wars" that allegedly involved him. His attorney's failure to object to such evidence was professionally unreasonable, grossly prejudicial, and constituted ineffective assistance of counsel. Continually throughout Mr. Jackson's trial, with the objective of arousing the passions and prejudices of the jury, the prosecutor injected evidence of the earlier "shoot outs" allegedly involving Mr. Jackson and State witnesses Eric Dunlap and Arlvelt Bruster. The prosecutor continually emphasized the "street war" and "gang war" theme through repeated questions of State witnesses Eric Dunlap and Arlvelt Bruster. One example of such questioning of Eric Dunlap is as follows:

Q. . . .Have you ever had trouble with these six individuals?
A. Yes.
Q. And can you tell us about that?
A. Once while I was driving down Brooklyn, me and some more friends of mine, these young

men was in a brown and white station wagon and they started shooting at us.

Q. Okay. . .Have you had any other shoot-outs with them?

A. Not really, no.

(Tr. at 204) Examples of similar questioning of Arlvelt Bruster are as follows:

Q. Prior to September 13th and 14th, had you ever had any shoot-outs with Mr. Jackson?

A. Yes.

Q. On how many occasions?

A. Several.

Q. Would he shoot at you?

A. Yes. He would shoot first and I would shoot back.

(Tr. at 343)

Q. You've now handed me State's Exhibit Number 72?

A. Terrance Jackson.

Q. Is that the man that you had known for three years before this?

A. Yes.

Q. That you had been involved with in shoot-outs?

A. Yes.

(Tr. at 359)

Q. Is this a north-south dispute, or what is this that's going on?

A. I don't know what it was.

Q. You don't know what it was. Just shooting at people?

A. They were shooting at me.

Q. So it was your plan to retaliate then?

A. Yes.

(Tr. at 363)

Evidence of uncharged crimes is not admissible if used for the purpose of merely showing the propensity of the defendant to commit such crimes. State v. Bernard, 849 S.W.2d 10, 13 (Mo. banc 1993); State v. Reese, 274 S.W.2d 304, 307 (Mo. banc 1954); cf. Fed. R. Evid. 404(b). United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994), cert. denied, 115 S.Ct. 768 (1995);. Evidence of uncharged prior misconduct of the defendant is admissible only if the evidence is logically relevant in that it has some legitimate tendency to establish directly the defendant's guilt of the charges for which he is on trial. Cf. State v. Sladek, 835 S.W.2d 308, 311 (Mo. banc 1992); United States v. Kandiel, 865 F.2d 967 (8th Cir. 1989).

Evidence of other uncharged misconduct has legitimate tendency to prove the defendant's guilt only when it tends to establish: 1) motive; 2) intent; 3) the absence of mistake or accident; 4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or 5) the identity of the person charged with the commission of the crime on trial. Sladek, 835 S.W.2d at 311; Erickson, 793 S.W.2d at 365.

Applying the above-described standards, evidence of other alleged gunfire exchanges between witnesses and Mr. Jackson did not have a tendency to prove the crime specifically charged through any of the five enumerated exceptions to the general rule barring evidence of uncharged crimes. Evidence of other alleged shooting incidents involving

a variety of participants and different settings has no legitimate tendency to prove Mr. Jackson's guilt of the instant offenses. To the extent the evidence may have possessed negligible probative value, such probative value was wholly overwhelmed by the prejudicial effect, which was to inflame the jurors and convince them of Petitioner's propensity to commit violent crime. As stated, such evidence is not properly admissible to show propensity. The admission of the evidence so tainted the entire proceedings that it deprived Petitioner of a fair trial and due process of law. A denial of due process occurs when the error is "'gross, conspicuously prejudicial and of such import that the trial was fatally inflicted.'" Lashley, 957 F.2d at 1499-1500. In Mr. Jackson's case, the error was gross, overwhelmingly prejudicial and fatally undermined the fairness of the trial.

Petitioner's counsel, by failing to object to the evidence of uncharged crimes, failed wholly to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances and, in so failing, completely undermined the adversarial process and deprived Petitioner of a fair trial. Mr. Jackson submits that he was grossly prejudiced because a reasonable probability existed that, but for his counsel's errors, he would have been found innocent. See Strickland, 466 U.S. at 587-88.

In sum, Mr. Jackson was denied due process of law, a fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This Court should grant him a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

2. The Trial Court's Admission of Evidence of Other Uncharged Crimes of Petitioner Constituted Plain Error and Violated Petitioner's Rights Under the Fifth, Sixth, and Fourteenth Amendments.

The admission of evidence of other uncharged crimes allegedly committed by Petitioner constituted plain error and violated Mr. Jackson's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Mr. Jackson asserts that the admission of the prior "bad acts" evidence, as described above, was such an egregious error that it affected his "substantial rights" and resulted in "manifest injustice" and a "miscarriage of justice." See Mo. R. Crim. P. 30.20 and 29.12(b).

Mr. Jackson asserted in his direct appeal that the admission of the evidence of uncharged crimes constituted plain error. The Missouri Court of Appeals rejected this argument on the merits. Mr. Jackson's argument is thus fully preserved and is not procedurally defaulted. As stated by the Eighth Circuit, "Missouri plain error review constitutes review on the merits and therefore no procedural defect bars habeas review." Abdullah v. Groose, 44 F.3d 692, 696 (8th Cir. 1995); see also Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994). When the state court has reviewed a petitioner's claim under a plain error standard, the federal court also applies a plain error standard on habeas review. Jones, 20 F.3d at 854. See United States v. Whitetail, 956 F.2d 857, 861 (8th Cir. 1992) (defining plain error as error that undermines the fundamental fairness of the trial and contributes to a miscarriage of justice).

Petitioner Jackson asserts that the admission of evidence of uncharged crimes, as discussed supra, was so prejudicial that it amounted to a denial of his rights to due process and a fair trial. Hollins, 969 F.2d at 609 (citing Urquhart v. Lockhart, 726 F.2d 1316, 1318 (8th Cir. 1984); see also Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974). The admission of this evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments, and constitutes plain error of constitutional magnitude.

Based on the foregoing facts and authorities, this Court should grant Mr. Jackson a certificate of appealability as to this

issue because it involves a substantial showing of the denial of a constitutional right.

3. Appellant was Denied Due Process, a Fair Trial and the Effective Assistance of Counsel in that Counsel Failed to Object to the Inflammatory Statements and Arguments of the Prosecutor That Improperly Personalized the Evidence, All in Violation of Petitioner's Rights Under the Fifth, Sixth, and Fourteenth Amendments.

Throughout the trial, the prosecutor continually indulged in blatantly inflammatory and prejudicial language before the jury. Such blatant prosecutorial misconduct, which infects the trial with unfairness, is prohibited by due process. See Darden v. Wainwright, 477 U.S. 168, 181 (1986).

Mr. Jackson was denied the effective assistance of counsel in that his trial attorney failed to object to the prosecutor's inflammatory and improper statements and argument. The remarks were so improper, that counsel's "only defensible choice" was to object. See Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). The trial counsel's failure was professionally unreasonable and grossly prejudiced Mr. Jackson, denying his rights to due process, a fair trial, and the effective assistance of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments.

Mr. Jackson raised this issue in his state post-conviction proceedings. The Missouri Court of Appeals rejected this argument pertaining to ineffective assistance of counsel on the basis that the prosecutor's statements and arguments were within permissible bounds. This issue has thus been fully preserved.

As stated above, the standard for ineffective assistance of counsel requires the petitioner to show that his attorney's performance fell below an objective standard of reasonableness and created a reasonable probability that, but for those errors,

the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88. See also West v. United States, 994 F.2d 510, 513 (8th Cir. 1993) (petitioner prejudiced if result of proceedings rendered unreliable or fundamentally unfair). In this case, the failure of Mr. Jackson's trial attorney to object to the inflammatory and personalizing statements and argument by the prosecutor was professionally unreasonable and cannot be deemed a reasonable trial strategy.

Federal courts reviewing habeas claims of state prisoners premised upon prosecutorial misconduct in closing arguments review such claims for their egregiousness, looking for those claims which "amount to a denial of constitutional due process." Donnelly v. DeChristeforo, 416 U.S. 637, 647-48 (1974). This is one of those cases. The misconduct by the prosecutor was extreme, and the failure of Petitioner's trial attorney to object grossly prejudiced Petitioner and rendered the trial fundamentally unfair.

The relevant inquiry is whether the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. See also Alexander v. Armontrout, 985 F.2d 976, 978 (8th Cir.), cert. denied, 114 S. Ct. 224 (1993); Harper v. Grammar, 895 F.2d 473, 482 (8th Cir. 1990). Such fundamental unfairness may be the cumulative result of such comments that occurred from the start to the finish of a trial. In such a case, the misconduct is so egregious that the defendant could not have received a fair trial. See Floyd v. Meachum, 907 F.2d 347 (2d Cir. 1990).

In this case, the prosecutor repeatedly referred to the "on-going gang war" in Kansas City and stated that Mr. Jackson was an integral part of that war. He referred to bullets flying through the air and striking people down and stated that Mr. Jackson was related to these incidents. These remarks and others made by the prosecutor in Mr. Jackson's case, as described below, violated his right to a fair trial and due process of law.

The remarks by the prosecutor began in his opening statement with repeated references to an on-going "street wars" between Mr. Jackson and persons in the park on the evening of September 14, 1988. Tr. at 173. He referred to witnesses as "participants in this ongoing street war." Tr. at 174. He then spoke of several alleged shoot-outs between Mr. Jackson and witnesses involved in the case and stated "[t]his is just a continuing war that they have going on." Tr. at 176. Again and again, the prosecutor referred to this "war." Tr. at 190, 191.

The prosecutor continued the theme in his closing arguments, injecting improper and inflammatory comments throughout:

> You see, ladies and gentlemen, this isn't "Mayberry RFD." This is reality. These are the streets of our city, blood-soaked streets, crime-ransacked streets, streets were made into a war zone by Terrance Jackson on September the 14th, 1988. If you don't like Eric Dunlap and Arlvelt Bruster because they're part of the gang war, fine.

Tr. at 665. He continued, stating:

> And what do we do to tell Terrance Jackson, "You can't get away with this bloodshed, this ridiculous bloodshed which has made Kansas City the murder capital of our country?" You want to fight the war? This is your only opportunity you're going to have. And if you want to fight back, if you want to tell Terrance Jackson that he can't get away with what he did, and if you want to make this city safe then you do it by giving him the maximum . . ."

Tr. at 673. The prosecutor concluded his closing argument with the statement, "If you want to stop this war, you don't give mercy to the people who are causing the bloodshed." Tr. at 673.

Petitioner's counsel, by not objecting to the prosecutor's blatantly inflammatory and unfairly prejudicial statements and arguments, failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. His professionally unreasonable performance completely undermined the adversarial process and deprived Petitioner of a fair trial. Mr. Jackson was grossly prejudiced, as a reasonable probability existed that, but for counsel's errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 687-88.

In sum, Mr. Jackson was denied due process of law, a fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. This Court should grant him a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

4. The Trial Court Committed Plain Error by Permitting the Prosecutor to Use Blatantly Inflammatory and Prejudicial Language in His Statements and Arguments; Such Language Improperly Personalized the Evidence and Violated Petitioner's Rights to Due Process and a Fair Trial, in Violation of the Fifth, Sixth, and Fourteenth Amendments.

The trial court committed plain error when it permitted the prosecutor to indulge in blatantly inflammatory and unfairly prejudicial language in his statements and arguments before the jury. These improper statements violated Mr. Jackson's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Mr. Jackson asserts that the prosecutor's statements and arguments, as described above,

were so egregious and unfairly prejudicial that they constituted plain error, violated his right to a fair trial, and "amount[ed] to a denial of constitutional due process." Donnelly, 416 U.S. at 647-48. The error by the trial court affected Mr. Jackson's "substantial rights" and resulted in "manifest injustice" and a miscarriage of justice." See Mo. R. Crim. P. 29.12(b) and 30.20.

Mr. Jackson asserted in his direct appeal that the trial court committed plain error by permitting the blatantly inflammatory and unfairly prejudicial statements and arguments by the prosecutor. The Missouri Court of Appeals rejected this argument on the merits. Mr. Jackson's argument is thus fully preserved and is not procedurally defaulted. See Abdullah, 44 F.3d at 696; see also Jones, 20 F.3d at 854. As stated above, when the state court has reviewed a petitioner's claim under a plain error standard, the federal court also applies a plain error standard on habeas review. Jones, 20 F.3d at 854.

Petitioner Jackson asserts the prosecutor's blatantly inflammatory and unfairly prejudicial language, as discussed above, was so egregious that it amounted to a denial of his rights to due process and a fair trial. The admission of this evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments, and constitutes plain error of constitutional magnitude.

Based on the foregoing facts and authorities, this Court should grant Mr. Jackson a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

5. Petitioner was Denied Due Process of Law and Effective Assistance of Counsel in that Appellate Counsel Failed to Brief the Issue of Sufficiency of the Evidence to Support a Finding of Guilt Beyond a Reasonable Doubt.

The Due Process Clause requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof. Jackson v. Virginia, 443 U.S. 307, 324 (1979). In Jackson, the court held that in a 28 U.S.C. § 2254 habeas corpus proceeding, "sufficient proof" is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Id. See also Brouillette v. Wood, 636 F.2d 215, 217 (8th Cir.), cert. denied, 450 U.S. 1044 (1981). Thus, a conviction based upon a record wholly devoid of relevant evidence of a crucial element of the offense charged is constitutionally infirm. Jackson, 443 U.S. at 314. In the present case, the State did not present sufficient evidence to meet its burden of proof for the convictions of murder in the second degree, assault in the first degree, and armed criminal action.

Inexplicably, Mr. Jackson's appellate counsel failed to raise the issue of sufficiency of the evidence on appeal.[1] The appellate attorney thus failed to render the effective assistance of counsel to which Petitioner was constitutionally entitled on appeal. Mr. Jackson raised this issue in a motion to recall the mandate, which was denied on August 29, 1995, by the Missouri Court of Appeals, Western District.

The constitutional right to effective assistance of appellate counsel was recognized by the United States Supreme Court in Evitts v. Lucey, 469 U.S. 387 (1985). In Evitts, the Court held that without effective assistance of counsel, the defendant is denied due process of law in the appellate courts. The Court stated:

> In short, the promise...that a criminal defendant has a right to counsel on appeal —

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[1]The trial attorney properlly preserved this issue for appellate review by making the appropriate motions for judgments of acquittal at trial. Tr. at 583, 625.

> like the promise. . .that a criminal defendant has a right to counsel at trial — would be a futile gesture unless it comprehended the right to effective assistance of counsel.

469 U.S. at 397.

The Supreme Court and other courts agree that appellate counsel's failure to raise a specific issue on appeal does not necessarily warrant a finding of per se prejudice. Jones v. Barnes, 463 U.S. 745 (1983). Following the Supreme Court's treatment of this issue, lower courts have uniformly applied the Strickland two-pronged tests, requiring findings that counsel's performance fell below a reasonable standard of conduct, and that such conduct resulted in prejudice to the defendant. In Gray v. Greer, 800 F.2d 644 (7th Cir. 1986), the Seventh Circuit articulated a test for reasonable conduct requiring the court to determine:

> [w]hether appellate counsel failed to present significant and obvious issues on appeal. . .Generally, only when ignored issues are clearly stronger than those presented will a presumption of effective assistance be overcome.

Gray, 800 F.2d at 646.

Mr. Jackson's appellate attorney, in failing to challenge the sufficiency of evidence on appeal, failed to raise a significant and obvious issue that a competent appellate attorney would have raised. The attorney's failure was professionally unreasonable and grossly prejudiced Mr. Jackson. As stated, the State failed to offer sufficient evidence to meet its burden of proof that Mr. Jackson was guilty beyond a reasonable doubt.

Thus, the conviction violates Mr. Jackson's rights to due process, a fair trial, and the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

In order to find Mr. Jackson guilty of second degree murder, the State had to prove that Mr. Jackson, either acting alone or in concert with another individual, knowingly caused the death of Robert Wright by shooting him. Mo. Rev. Stat. § 565.021.1. In order to find Mr. Jackson guilty of first degree assault, the State had to prove that Mr. Jackson, either acting alone or in concert with another individual, knowingly caused serious physical injury to Carl Washington. Mo. Rev. Stat. § 565.050.

In the present case, the State failed to demonstrate that Mr. Jackson committed either of these crimes, or the related offenses of armed criminal action. The State presented testimony from Eric Dunlap, who indicated that he had seen a blue van driving toward the park and when the van door was opened, he believed he saw Mr. Jackson among the occupants of the van. Later, Dunlap went to the police station and was given some photographs to look at to see if he could identify anyone in the van involved in the incident. Dunlap picked out Mike Hamilton's photograph but told the police officer that he "couldn't tell from these photographs." Tr. at 224. The officer told Dunlap to keep looking at them and left the room. Dunlap then turned over the photographs and observed names written on the back of the pictures. When the officer returned, Dunlap picked out photographs of Leroy Hudson and Mr. Jackson, only because their names were written on the back of the photographs. Tr. at 225. The police officer then told Dunlap that the individual he picked out was not Mr. Jackson. Tr. at 267. The officer then showed Dunlap some additional photographs and Dunlap then identified Mr. Jackson as one of the occupants of the blue van that night. The State also presented testimony from Arlvelt Bruster. According to Bruster, Leroy Hudson was driving the van and Michael

Hamilton, Mr. Jackson, and Michael Sanders were in the back of the van. Tr. at 353. Bruster testified that he observed "fire" coming from the back of the van as he ran behind a building to flee from the gun fire. Tr. at 353. Bruster also went to the police station to look at the photographs. He also told the police that the original picture looked like Mr. Jackson even though it was not. Tr. at 407.

Mr. Jackson relied on the defense of alibi and introduced testimony from his grandmother, who testified that he was at home when the shooting in the park occurred. Tr. at 601-03. Mr. Jackson's theory of defense was that both Dunlap and Bruster misidentified him as one of the individuals in the van on the night in question.

While a jury in a criminal case is allowed to rely on reasonable inferences from the evidence to convict the defendant, it is not allowed to rely on pure speculation. As the Missouri Supreme Court stated "mere suspicion, however strong, will not supply the place of evidence when life or liberty is at stake." State v. Bunton, 453 S.W.2d 949, 953 (Mo. 1970).

Mr. Jackson's conviction is based on the mere speculation and surmise of the jury members and must not stand. In the present case, the State failed to produce proof that would convince a trier of fact beyond a reasonable doubt of the existence of each and every element of the offense. Thus, when the trial court denied Mr. Jackson's motion for judgment of acquittal and a motion for new trial, he was effectively denied due process of law and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Further, the failure of Mr. Jackson's appellate attorney to brief this issue on appeal constituted ineffective assistance of appellate counsel. The performance of the appellate attorney was unreasonably deficient and grossly prejudiced Mr. Jackson. This Court should grant him a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

6. Petitioner Was Denied Due Process and the Effective Assistance of Counsel When Appellate Counsel Failed to Challenge the Admission of Eyewitness Identification Testimony That Was Obtained Through Unconstitutionally Suggestive Means; The Admission of the Testimony Should Have Been Challenged on the Basis of Plain Error and Through a Claim of Ineffective Assistance of Counsel.

At trial, Eric Dunlap testified that after the shooting incident he went to the hospital to check on the victim. While at the hospital, a police officer asked him to come to the police station to give a statement. Mr. Dunlap went to the police station and was handed a photo array and asked to identify the individuals in the blue van. Dunlap picked out Mike Hamilton's photograph but told the police officer that he "couldn't tell [make an identification] from these photographs." Tr. at 224. The officer told Dunlap to "keep looking at them" and left the room. Dunlap then turned over the photographs and observed names written on the back of the pictures. When the officer returned, Dunlap picked out photographs of Leroy Hudson and Mr. Jackson, only because their names were written on the back of the photographs. Tr. at 225. The officer told Dunlap that he was wrong and that, in fact, exhibit 65 was not a photograph of Mr. Jackson. The officer showed Dunlap some additional photographs. Tr. at 227. This time Dunlap identified Mr. Jackson. Tr. at 231.

Clearly, Dunlap's identification of Mr. Jackson was obtained as a result of an unconstitutionally suggestive photo identification procedure which created a substantial risk of irreparably mistaken identification of Mr. Jackson, in violation of his rights to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. However, Mr. Jackson's trial attorney failed to file a pretrial motion to suppress this identification testimony, and did not object at trial. Although the attorney representing Mr. Jackson

after conviction raised the identification issue in the Rule 29.15 petition, she did not raise this issue on appeal. Mr. Jackson asserts that his appellate attorney was ineffective for failing to raise the identification issue in his appeal on the bases that: (1) admission of this evidence constituted plain error, and (2) the trial attorney was constitutionally ineffective for failing to properly object to the identification evidence. The resulting conviction, based substantially on the improper identification testimony, violated Mr. Jackson's rights to a fair trial, due process, and the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

The Fifth and Fourteenth Amendments to the United States Constitution require that pre-indictment, pretrial confrontations between suspects and witnesses for purposes of identification cannot be so "unnecessarily suggestive" and so "conducive to irreparable mistaken identification" as to violate due process of law. Stovall v. Denno, 388 U.S. 293, 301 (1967). The policy behind this due process guarantee is to protect against "the vagaries of eyewitness identification" which have caused "the high incidence of miscarriage of justice." United States v. Wade, 388 U.S. 218, 227-229 (1967). The objective of the constitutional doctrine is two-fold: on one hand, it is intended to discourage suggestive identification procedures on the part of police officers. On the other hand, it is intended to minimize the chance that an innocent person might be convicted on the basis of a faulty identification. Mr. Jackson raised the claim that his appellate attorney was ineffective in his Motion to Recall the Mandate, which was denied by the Missouri Court of Appeals.

The first objective is satisfied by applying the standards of Gilbert v. California, 388 U.S. 263 (1967), and Foster v. California, 394 U.S. 440 (1968), and excluding out-of-court identification once it is shown that suggestive procedures were used at the line-up or photo array. In-court identification is

judged by a different standard inquiring into the reliability of the identification. See Gilbert, 388 U.S. at 272-73.

The rationale for treating out-of-court identification separately from in-court identification is that out-of-court identification "will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial." Gilbert, 388 U.S. at 274. That opinion also takes note of the independent significance of out-of-court identification:

> Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached. . .evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.

388 U.S. at 272.

Because of the impact of such testimony, whenever an impermissibly suggestive procedure is employed, or where a defendant is denied counsel in a post-indictment line-up, only a "per se exclusionary rule" applied to the out-of-court identification will serve the policy to deter suggestive police procedures. See Foster v. California, 394 U.S. 440 (1968); see also Gilbert, 388 U.S. at 272.

By failing to file a pretrial motion to suppress the identification testimony, Mr. Jackson's trial attorney irreparably damaged his defense and prejudiced him. Had a pretrial motion been successful, as is likely given the questionable, uncertain and unreliable nature of the identification procedures, such motion would have precluded the identification testimony of Eric Dunlap. The failure to challenge this evidence was especially prejudicial in this case, as the State's case against Mr. Jackson rested almost entirely on eyewitness testimony (a substantial portion of which came from Mr. Dunlap). Because Mr. Dunlap's out-of-court identification inevitably tainted any in-court identification, such in-court identification also was not proper and constituted plain error. See Gilbert, 388 U.S. at 272.

Other courts have recognized that the failure to file and pursue a motion to suppress identification testimony in similar situations constitutes ineffective assistance of counsel. For example, in People v. Sims, 389 N.Y.S.2d 129 (N.Y. 1976), the court held that where pretrial identification procedures had been conducted at the police station, it was inexcusable to fail to file a timely pretrial motion to suppress the identification testimony.

In the instant case, trial counsel's failure to file a pretrial suppression motion resulted in the admission of this testimony and resulted in a failure to adequately preserve this meritorious issue for appellate review. Mr. Jackson raised this ground in his 29.15 Motion alleging that his attorney's failure to file a pretrial suppression motion constituted ineffective assistance of counsel.

Despite the fact that this issue was properly raised and briefed in the 29.15 proceedings, appellate counsel failed to include this issue in Mr. Jackson's appellate brief, resulting in ineffective assistance of appellate counsel. The admission of Dunlap's testimony as to his in-court and out-of-court identifications clearly constituted plain error under the authorities cited above. Although the Sixth Amendment right to the effective assistance of counsel generally does not extend to post-conviction proceedings, Pennsylvania v. Finley, 481 U.S. 551 (1987), Mr. Jackson asserts that his Sixth Amendment rights were violated because post-conviction counsel also represented him in his direct appeal. As stated supra, criminal defendants have the right to effective assistance of counsel on appeal. Further, as this Court is aware, the direct appeal was consolidated with the post-conviction appeal under the former Missouri Court rules. Because the appeal was a consolidated proceeding, the Sixth Amendment right to the effective assistance of counsel should extend to all aspects of the appeal, regardless of whether they are part of the "direct" appeal component, or the "post-conviction" appeal component. Both components are part of an indivisible, unified representation by one attorney. Logic and fundamental fairness dictate that the defendant must be constitutionally entitled to the effective representation of counsel in this proceeding.[2]

Because the identification issue had substantial merit, appellate counsel clearly was ineffective for failing to raise it on a plain error basis. Further, a reasonably competent attorney would also have asserted that trial counsel was ineffective for failing to object in the first place. Because the state's case

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[2] Mr. Jackson asserts that to the extent case law suggests that defendants are not entitled to the effective assistance of counsel in post-conviction proceedings, such cases are wrongly decided and should be reconsidered in light of the fundamental rights guaranteed by the Sixth Amendment.

depended so heavily on eyewitness testimony, Mr. Jackson was substantially prejudiced by the ineffective representation of his attorneys. The failures of his trial and appellate attorneys and the admission of the impermissibly suggestive eyewitness identification violated Mr. Jackson's rights to due process, a fair trial, and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments. This Court should grant him a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

IV. EVIDENTIARY HEARING

Mr. Jackson was entitled to an evidentiary hearing in this matter. The claims for which Mr. Jackson seeks relief include critical issues regarding due process, a fair trial, the effective assistance of counsel, and plain, constitutional error on the part of the trial court. Mr. Jackson submits that an evidentiary hearing is necessary for the Court to fairly determine whether the performance of both trial and appellate counsel fell below an objective standard of reasonableness, and if so, whether said errors substantially prejudiced Mr. Jackson. Townsend v. Sain, 371 U.S. 293 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). This Court should grant him a certificate of appealability as to this issue because it involves a substantial showing of the denial of a constitutional right.

V. CONCLUSION

Based on the foregoing arguments and authorities, Petitioner Jackson respectfully requests that this Court grant him a certificate of appealability or a certificate of probable cause as to his entire case on the basis that his petition was filed before the AEDPA was enacted. Alternatively, he requests that

this Court grant him a certificate of appealability as to each and every issue briefed in this Application, including ineffective assistance of counsel based on failure to object to evidence of other uncharged crimes and plain error regarding the admission of this same evidence; ineffective assistance of counsel in failing to object to the inflammatory remarks of the prosecutor and plain error by the court in permitting the remarks; ineffective assistance of appellate counsel in failing to brief the issue of sufficiency of the evidence; ineffective assistance of trial and appellate counsel in failing to attack the unconstitutional eyewitness identification procedures; and the failure to grant an evidentiary hearing. Mr. Jackson respectfully requests a certificate of appealability as to all issues as well as any other relief deemed just and proper.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed, via United States Mail, this _____ day of _____, 1999, to:

Michael J. Spillane
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

/S/

_____

ATTORNEY FOR APPELLANT